# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 213. 73

THE OREGON RAILROAD AND NAVIGATION COMPANY, APPELLANT,

*vs.*

ROBERT BALFOUR ET AL., PARTNERS, DOING BUSINESS AS BALFOUR, GUTHRIE & CO., ET AL.

No. 214. 74

THE OREGON RAILWAY AND NAVIGATION COMPANY AND THE OREGON SHORT LINE AND UTAH NORTHERN RAILWAY COMPANY, APPELLANTS,

*vs.*

ROBERT BALFOUR ET AL., PARTNERS, DOING BUSINESS AS BALFOUR, GUTHRIE & CO., ET AL.

APPEALS FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

FILED MAY 25, 1899.

(17,427 and 17,428.)

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## SUPREME COURT OF THE UNITED STATES.

### OCTOBER TERM, 1899.

No. 313.

THE OREGON RAILROAD AND NAVIGATION COMPANY, APPELLANT,

*vs.*

ROBERT BALFOUR ET AL., PARTNERS, DOING BUSINESS AS BALFOUR, GUTHRIE & CO., ET AL.

No. 314.

THE OREGON RAILWAY AND NAVIGATION COMPANY AND THE OREGON SHORT LINE AND UTAH NORTHERN RAILWAY COMPANY, APPELLANTS,

*vs.*

ROBERT BALFOUR ET AL., PARTNERS, DOING BUSINESS AS BALFOUR, GUTHRIE & CO., ET AL.

APPEALS FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

INDEX.


| | Original. | Print. |
|---|---|---|
| Transcript from the district court of the United States for the district of Oregon in case of Short, administratrix, &c., *et al. vs.* The Barge "Columbia," &c., *et al.*, No. 172, in United States circuit court of appeals | 1 | 1 |
| Citation and service | 1 | 1 |
| Libel and petition | 6 | 1 |
| Stipulation for costs | 16 | 6 |
| Order appointing appraisers | 18 | 8 |
| Oath of appraisers | 20 | 9 |


JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., SEPTEMBER 1, 1899.

| | Original. | Print. |
|---|---|---|
| Report of appraisers | 21 | 9 |
| Order allowing petitioners to file stipulation for appraised value of the barge | 23 | 10 |
| Stipulation for value of barge | 24 | 10 |
| Order for monition | 26 | 12 |
| Marshal's return | 29 | 13 |
| Proof of publication of monition | 30 | 14 |
| Exhibit A—Monition | 31 | 14 |
| Monition | 33 | 15 |
| Acceptance of service of monition | 35 | 17 |
| Answer of Balfour, Guthrie & Co. | 36 | 17 |
| Stipulation as to time to plead | 44 | 21 |
| Answer of Wm. Boyce | 45 | 22 |
| Stipulation as to time to present claims, &c. | 54 | 26 |
| Stipulation as to time to file exceptions, &c. | 55 | 27 |
| Answer of Short, administratrix | 56 | 28 |
| Answer of Anderson, administrator | 65 | 32 |
| Answer of Anna C. Larson | 75 | 36 |
| Amended answer of Wm. Boyce | 86 | 42 |
| Exceptions to answer of Short, administratrix | 99 | 50 |
| Anderson, administrator | 102 | 51 |
| Anna C. Larson | 106 | 53 |
| Exceptions to amended answer of Wm. Boyce | 110 | 54 |
| Stipulation waiving replication to answer of Short, administratrix | 113 | 56 |
| Stipulation waiving replication to answer of Anderson, administrator | 114 | 56 |
| Stipulation waiving replication to answer of Anna C. Larson | 115 | 57 |
| Stipulation waiving replication to amended answer of Wm. Boyce | 116 | 57 |
| Stipulation as to time to file exceptions, &c. | 117 | 58 |
| Stipulation as to time to file exceptions, &c. | 118 | 60 |
| Stipulation waiving replication to answer of Balfour *et al.* | 119 | 60 |
| Stipulation to amend amended answer and cross-libel of Boyce | 121 | 61 |
| Second amended answer of Wm. Boyce | 122 | 61 |
| Exceptions to second amended answer of Wm. Boyce | 136 | 68 |
| Order sustaining exceptions to answer of Wm. Boyce | 139 | 70 |
| Order denying exceptions to answer of Short, administratrix, &c., *et al.* | 140 | 71 |
| Answer and cross-libel of Wm. Boyce | 141 | 71 |
| Stipulation for costs of Wm. Boyce | 154 | 78 |
| Answer and exceptions to cross-libel of Wm. Boyce | 156 | 79 |
| Stipulation waiving reply to answer of Wm. Boyce | 162 | 82 |
| Stipulation to amend answer of Balfour *et al.* | 163 | 83 |
| Stipulation as to insurance money paid Balfour *et al.* | 165 | 84 |
| Decree of February 19, 1894 | 166 | 85 |
| Opinion of Bellinger, J. | 171 | 87 |
| Decree of February 26, 1894 | 178 | 91 |
| Petition for appeal by Short, administratrix, &c., *et al* | 180 | 92 |
| Order allowing appeal of Short, administratrix, &c., *et al.* | 198 | 101 |
| Notice of appeal of Short, administratrix, &c., *et al.* | 199 | 101 |
| Bond on appeal of Short, administratrix, &c., *et al.* | 201 | 102 |

| | Original | Print. |
|---|---|---|
| Evidence for respondents | 203 | 103 |
| Testimony of W. J. Burns | 204 | 103 |
| W. K. Scott | 208 | 106 |
| S. B. Hendee | 212 | 109 |
| L. W. Benedict | 219 | 112 |
| A. H. Ripley | 235 | 122 |
| James Collins | 237 | 123 |
| Edward Tackaberry | 248 | 130 |
| B. R. Pegram | 275 | 146 |
| Alfred C. Simmons | 277 | 148 |
| George Carter | 289 | 155 |
| J. W. Babidge | 298 | 160 |
| T. F. Neal | 311 | 167 |
| A. H. Ripley (recalled) | 314 | 169 |
| Robert Anderson | 316 | 170 |
| William Boyce | 323 | 175 |
| W. K. Scott (recalled) | 350 | 191 |
| B. R. Pegram (recalled) | 352 | 192 |
| J. C. Flanders | 354 | 193 |
| David Walker, M. D | 363 | 198 |
| Richard Henry Barber | 373 | 204 |
| John Ferguson | 377 | 206 |
| W. J. Burns (recalled) | 381 | 209 |
| Edward Tackaberry (recalled) | 383 | 210 |
| Mrs. Marshal B. Short | 386 | 211 |
| S. Anderson | 388 | 212 |
| William Boyce (recalled) | 391 | 214 |
| | 394 | 216 |
| Evidence for petitioners | 394 | 216 |
| Testimony of J. H. D. Gray | 409 | 224 |
| N. J. Blagen | 422 | 232 |
| John Rutter | 439 | 242 |
| J. C. Flanders | 440 | 243 |
| H. Olson | 444 | 246 |
| G. W. Lounsberry | 445 | 246 |
| J. S. Dellinger | 451 | 250 |
| H. Anderson | 470 | 261 |
| Paul R. Deady | 471 | 262 |
| B. R. Pegram | 473 | 263 |
| N. J. Blagen (recalled) | 475 | 264 |
| P. Carstens | 515 | 287 |
| W. S. Rogers | 521 | 291 |
| R. W. Baxter | 523 | 292 |
| B. R. Pegram (recalled) | 525 | 294 |
| S. B. Hendee | 526 | 295 |
| P. Carstens (recalled) | 527 | 295 |
| George W. Asplund | 529 | 296 |
| G. W. Lounsberry (recalled) | 539 | 303 |
| John F. Graves | 544 | 306 |
| Fred S. Smith | 559 | 315 |
| John Ferguson | 561 | 316 |
| Edward Tackaberry | 562 | 317 |
| William Mann | 566 | 319 |
| John Ferguson (recalled) | | |

| | Original. | Print. |
|---|---|---|
| Evidence for respondents in rebuttal | 568 | 321 |
| Testimony of Edward Tackaberry | 568 | 321 |
| William Boyce | 570 | 321 |
| John Whittle | 571 | 322 |
| Evidence for respondent Wm. Boyce | 574 | 324 |
| Testimony of Dr. G. B. Young | 574 | 324 |
| Further evidence for respondents | 580 | 327 |
| Deposition of H. A. Mathews | 583 | 329 |
| William Chadwick | 588 | 332 |
| J. H. D. Gray | 599 | 338 |
| R. M. Stuart | 612 | 345 |
| T. F. Neal | 614 | 347 |
| W. J. Barry | 619 | 349 |
| William Pohl | 626 | 354 |
| J. W. Babbidge | 630 | 356 |
| Exhibit 1—Union Pacific circular No. 1 | 642 | 363 |
| 2—Photolithograph | 647 | 364 |
| 3 and 4—Photographs of barge "Columbia" | 649 | 364 |
| 5—Appointment of B. R. Pegram as superintendent of water lines | 651 | 365 |
| Certificate of enrollment of barge "Columbia" | 652 | 365 |
| Diagram of cross-section of barge "Columbia" | 654½ | 366 |
| Clerk's certificate to transcript | 655 | 367 |
| Depositions taken in United States circuit court of appeals in No. 172 | 656 | 367 |
| Stipulation to take testimony | 657 | 367 |
| Deposition of Edwin G. Mackay | 659 | 368 |
| James Robinson | 663 | 370 |
| Phillip G. Eastwick | 669 | 373 |
| Exhibit A—Diagram of east dock at Astoria | 671 | 375 |
| B—Profile sheet | 674 | 376 |
| C—Profile sheet | 675 | 376 |
| D—Photograph | 676 | 376 |
| Deposition of J. N. Fisher | 680 | 383 |
| Notary's certificate | 699 | 388 |
| Opinion in No. 172 | 701 | 388 |
| Decree in No. 172 | 705 | 391 |
| Order granting rehearing in No. 172 | 706 | 391 |
| Rehearing and submission in No. 172 | 707 | 391 |
| Order amending appeal in No. 172 | 708 | 392 |
| Opinion on rehearing in No. 172 | 709 | 392 |
| Dissenting opinion in No. 172 | 729 | 406 |
| Decree on rehearing in No. 172 | 730 | 406 |
| Transcript from district court of the United States for the district of Oregon of O. R. & N. Co. *et al. vs.* Balfour *et al.*, on appeal and cross-appeal, No. 435, in United States circuit court of appeals | 731 | 407 |
| Order extending time to docket | 732 | 407 |
| Order extending time to docket | 733 | 408 |
| Citation and service | 735 | 409 |
| Citation and service | 737 | 410 |
| Citation and service | 740 | 411 |
| Citation and service | 742 | 413 |
| Citation and service | 745 | 415 |

| | Original. | Print. |
|---|---|---|
| Citation and service | 748 | 417 |
| Citation and service | 751 | 419 |
| Citation and service | 754 | 421 |
| Citation and service | 757 | 423 |
| Citation and service | 760 | 425 |
| Citation and service | 763 | 426 |
| Mandate of United States circuit court of appeals | 766 | 427 |
| Order to file mandate | 769 | 429 |
| Motion by Balfour *et al.* for findings and decree in accordance with the mandate | 772 | 430 |
| Motion by Short *et al.* for findings and decree in accordance with the mandate | 774 | 431 |
| Order setting for hearing motions for findings, &c | 776 | 432 |
| Order for continuance | 777 | 433 |
| Hearing on motions | 779 | 433 |
| Order allowing Balfour *et al.* to file supplemental answer | 780 | 434 |
| Supplemental answer of Balfour *et al.* | 781 | 434 |
| Exceptions of O. R. & N. Co. to supplemental answer | 787 | 437 |
| Exceptions of O. S. L. & U. N. R'y Co. to supplemental answer | 790 | 438 |
| Order overruling exceptions | 793 | 439 |
| Motion for process for arrest of the "Ocklahama" | 794 | 440 |
| Order vacating order of April 18, 1896, &c | 798 | 442 |
| Amended supplemental answer of Balfour *et al.* | 800 | 442 |
| Warrant for arrest of the "Ocklahama" | 806 | 445 |
| Exceptions of O. R. & N. Co. to amended supplemental answer | 812 | 449 |
| Exceptions of O. S. L. & U. N. R'y Co. to amended supplemental answer | 815 | 450 |
| Order sustaining exceptions to amended supplemental answer | 817 | 451 |
| Motion for order to sell the "Ocklahama" | 819 | 451 |
| Order denying motion for order to sell the "Ocklahama" | 821 | 452 |
| Motion for order to sell the "Ocklahama" | 822 | 453 |
| Notice of application to set motion for hearing | 824 | 453 |
| Motion of O. R. & N. Co. for an order on the marshal to return the "Ocklahama" | 827 | 454 |
| Petition of receiver for order on the marshal to return the "Ocklahama" | 829 | 455 |
| Exceptions of Balfour *et al.* to petition of receiver | 833 | 457 |
| Order denying motion and petition for return of the "Ocklahama" | 835 | 458 |
| Petition of intervention of O. R. & N. Co | 836 | 458 |
| Order allowing O. R. & N. Co. to intervene | 842 | 462 |
| Claim of owner of the "Ocklahama" | 843 | 462 |
| Claimant's stipulation for costs | 845 | 463 |
| Petition of O. R. & N. Co. for return of the "Ocklahama" | 847 | 464 |
| Oath of appraisers | 851 | 466 |
| Appraisement of the "Ocklahama" | 852 | 466 |
| Stipulation for release of the "Ocklahama" | 853 | 467 |
| Order for release of the "Ocklahama" | 855 | 468 |
| Answer of O. R. & N. Co | 856 | 468 |
| Order allowing Balfour *et al.* to file exceptions | 864 | 472 |
| Exceptions of Balfour *et al.* to answer of O. R. & N. Co | 865 | 473 |
| Motion of Balfour *et al.* for findings | 867 | 474 |
| Order sustaining exceptions of Balfour *et al.* | 868 | 474 |

| | Original. | Print. |
|---|---|---|
| Answer of O. R. & N. C. to answer of Balfour *et al* | 869 | 475 |
| Short | 882 | 481 |
| Anderson | 895 | 488 |
| Larsen | 898 | 495 |
| Exceptions of Short to answer of O. R. & N. Co | 921 | 502 |
| Exceptions of Anderson to answer of O. R. & N. Co | 922 | 503 |
| Exceptions of Larsen to answer of O. R. & N. Co | 924 | 504 |
| Exceptions of Balfour *et al.* to answer of O. R. & N. Co | 926 | 504 |
| Decree of August 2, 1897 | 927 | 505 |
| Cost bill | 932 | 508 |
| Petition of O. R. & N. Co. to set aside decree | 934 | 509 |
| Notice of hearing of petition | 936 | 511 |
| Answer of Balfour *et al.* to petition to set aside decree | 938 | 511 |
| Decree of December 20, 1897 | 941 | 513 |
| Petition of O. R. & N. Co. for appeal from decree of December 20, 1897 | 947 | 516 |
| Order allowing appeal, &c | 949 | 517 |
| Assignment of errors by O. R. & N. Co | 950 | 517 |
| Bond on appeal of O. R. & N. Co | 957 | 521 |
| Petition of O. S. L. & U. N. R'y Co. for appeal from decree of December 20, 1897 | 960 | 522 |
| Order allowing appeal | 962 | 523 |
| Assignment of errors by O. S. L. & U. N. R'y Co | 964 | 524 |
| Bond on appeal of O. S. L. & U. N. R'y Co | 969 | 527 |
| Petition of O. R. & N. Co. for appeal from decree of December 20, 1897 | 972 | 528 |
| Order allowing appeal | 974 | 529 |
| Assignment of errors by O. R. & N. Co | 976 | 530 |
| Bond on appeal of O. R. & N. Co | 985 | 534 |
| Affidavit of service of assignment of errors, &c | 988 | 536 |
| Bond on appeal of O. R. & N. Co | 990 | 537 |
| Stipulation as to printing record | 992 | 538 |
| Petition of O. R. & N. Co. for appeal from decree of August 2, 1897 | 995 | 539 |
| Assignment of errors by O. R. & N. Co | 997 | 541 |
| Order allowing appeal, &c | 1005 | 544 |
| Bond on appeal of O. R. & N. Co | 1006 | 545 |
| Petition of O. S. L. & U. N. R'y Co. for appeal from decree of August 2, 1897 | 1009 | 547 |
| Assignment of errors by O. S. L. & U. N. R'y Co | 1011 | 548 |
| Order allowing appeal, &c | 1018 | 551 |
| Bond on appeal of O. S. L. & U. N. R'y Co | 1020 | 552 |
| Petition of O. R. & N. Co. for appeal from decree of August 2, 1897 | 1023 | 554 |
| Assignment of errors by O. R. & N. Co | 1026 | 555 |
| Order allowing appeal, &c | 1035 | 560 |
| Bond on appeal of O. R. & N. Co | 1038 | 561 |
| Order extending time to file transcript | 1040 | 563 |
| Petition of Balfour *et al.* for appeal from decree of August 2, 1897 | 1042 | 563 |
| Assignment of errors by Balfour *et al* | 1044 | 564 |
| Bond on appeal of Balfour *et al* | 1048 | 566 |

| | Original. | Print. |
|---|---|---|
| Petition of Balfour *et al.* for appeal from decree of December 20, 1897 | 1051 | 567 |
| Assignment of errors by Balfour *et al.* | 1053 | 568 |
| Bond on appeal of Balfour *et al.* | 1057 | 570 |
| Order allowing appeals, &c. | 1060 | 571 |
| Order extending time to file transcript | 1061 | 572 |
| Stipulation as to record on the several appeals | 1062 | 573 |
| Clerk's certificate to transcript | 1065 | 573 |
| Hearing and submission of No. 435 | 1067 | 574 |
| Opinion in No. 435 | 1068 | 575 |
| Decree in No. 435 | 1079 | 581 |
| Order staying mandate in No. 435 | 1080 | 582 |
| Petition for rehearing in No. 435 | 1081 | 582 |
| Order denying petition for rehearing in No. 435 | 1102 | 593 |
| Petition of O. R. & N. Co. for appeal to Supreme Court of the United States | 1103 | 594 |
| Assignment of errors | 1105 | 595 |
| Petition of O. R. & N. Co. and O. S. L. & U. N. R'y Co. for appeal to Supreme Court of the United States | 1118 | 601 |
| Assignment of errors | 1120 | 603 |
| Order allowing appeal of O. R. & N. Co | 1128 | 608 |
| Order allowing appeal of O. R. & N. C. and O. S. L. & U. N. R'y Co. | 1130 | 609 |
| Bond on appeal of O. R. & N. Co | 1132 | 610 |
| Bond on appeal of O. R. & N. Co. *et al.* | 1134 | 611 |
| Citation and service | 1137 | 613 |
| Citation and service | 1140 | 614 |
| Clerk's certificate | 1143 | 616 |

1-5 UNITED STATES OF AMERICA, } ss:
*District of Oregon,* }

To the Oregon Railway and Navigation Company and the Oregon Short Line and Utah Northern Railway Company, Greeting:

Whereas Malvina Short, administratrix, Sven Anderson, administrator, and Balfour, Guthrie and Company have lately appealed to the United States circuit court of appeals for the ninth circuit from a decree rendered in the district court of the United States for the district of Oregon in your favor, and has given the security required by law, you are, therefore, hereby cited and admonished to be and appear before said circuit court of appeals at San Francisco, California, within thirty days from the date hereof to show cause, if any there be, why the said decree should not be corrected and speedy justice should not be done to the parties in that behalf.

Given under my hand at Portland, in said district, this April 3d, 1894.

CHARLES B. BELLINGER,
*U. S. District Judge, Oregon.*

Served on me this 4th day of April, 1894.

W. W. COTTON,
*Proctor pr. Libellants and Petitioners.*

(Endorsed:) Filed April 5, 1894. R. B. Lamson, clerk, by G. H. Marsh, deputy clerk.

6 In the District Court of the United States for the District of Oregon, November Term, 1892.

Be it remembered that on the 29th day of November, 1892, there was duly filed in the district court of the United States for the district of Oregon a libel and petition of Oregon Railway and Navigation Co. *et al.* in words and figures as follows, to wit:

In the District Court of the United States for the District of Oregon.

*The Libel and Petition of the Oregon Railway and Navigation Co. and of the Oregon Short Line and Utah Northern Railway Company.*

To the Honorable Matthew P. Deady, judge of the district court of the United States for the district of Oregon:

The joint and several libel and petition of the Oregon Railway and Navigation Company, owner of the barge Columbia, and of the Oregon Short Line and Utah Northern Railway Company, the lessee of the said barge Columbia, in a cause of action civil and maritime, respectfully shows:

First. Your petitioner, The Oregon Railway and Navigation Company, is a corporation duly created and organized by and under the laws of the State of Oregon, having its principal place of business

in the city of Portland, Oregon, and as such corporation is the owner of a certain barge or lighter used and operated upon the Columbia and Willamette rivers, known as the Columbia.

Second. Your petitioner, The Oregon Short Line and
7 Utah Northern Railway Company, is a corporation duly organized and existing under and by virtue of an act of Congress of the United States entitled "An act creating the Oregon Short Line Railway Company, a corporation in the Territories of Utah, Idaho and Wyoming and for other purposes," approved August 2, 1882, and is engaged in the business of owning and operating steamboats and other vessels and in owning and operating lighters and barges between Portland in the State of Oregon, and Astoria in said State and elsewhere; and is and was during all the times hereinafter mentioned the lessee from the Oregon Railway and Navigation Company aforesaid for a period of ninety-nine (99) years from the first day of January, 1887, of the said barge Columbia and was at all the times hereinafter mentioned operating the said barge Columbia under the terms and provisions of the said lease and had the sole, exclusive possession, charge, control and management of the said barge Columbia.

Third. On or about the 21st day of October, 1892, the said barge or lighter Columbia left Portland, Oregon, having on board a cargo of wheat to be transported by the said barge from Portland, Oregon, to Astoria, Oregon, said wheat being part of the cargo of the British ship Westgate and destined to be transported by means of said ship and lighter from Portland, Oregon, to Liverpool, England. The said barge was seaworthy and in good order and condition and the said cargo of wheat was properly loaded thereon and all went well with the said barge and her said cargo until the said barge,
8 on the night of the 21st of October, 1892, reached Astoria, Oregon, at which point the said barge intended to tie up alongside the dock of the Oregon Railway & Navigation Company. That lying in front of the said dock and floating nearly level with the water was a float or pontoon which consisted of 12-inch by 12-inch timbers securely fastened together, said pontoon being sixty feet long, one foot thick and four feet wide and being fastened alongside and in front of the said dock for the purpose of preventing ships from chafing against the timbers of the said dock, and had recently been used for such purpose. That the darkness of the night rendered it impossible for the pilot and captain in charge of the Ocklahama, a steamboat towing the said barge, to see the said pontoon, and in attempting to make a landing at the said dock, the said barge ran against such pontoon with sufficient force to break the stem and forefoot of the said barge and to start her timbers to such an extent that the said barge commenced leaking. The persons in charge of the said barge deemed it necessary and advisable to remove the said barge into more shallow water in order that the said barge and her cargo might be more conveniently saved, and thereupon the said barge was taken behind the said dock and was placed alongside the rear portion of the said dock. After an examination had been made by the men in charge of the said barge, it was found that the

barge would probably float if the pumps were used, and thereupon the men in charge of the barge commenced using the pumps and kept the leak under control so that the barge did not continue to make water faster than it was pumped out of her. The
9 cargo upon the said barge was entirely loaded upon her deck as is customary and proper in vessels of her character and at the time that the said pumps were working no part of the cargo of the said barge was injured in any manner whatsoever, but the said cargo was injured in the manner hereinafter described. The men in charge of the said barge undertook to stop the leak in the barge by building a bulkhead, intending to place between the said bulkhead and the bow of the barge, sacks of wheat for the purpose of stopping the leak in the bow of the said barge. In order to aid in the work of the building of the said bulkhead, three men among others, entered the hold to the said barge. These men were Marshal Short, the captain of the Ocklahama, William Boyce, a deck hand on the Ocklahama and one Gus Patterson. The said last man being a deck hand upon the said barge or on the said Ocklahama. The tide at this time was ebbing and while the men were in the hold of the said barge, the same touched ground. An examination was thereupon made by the men in charge of the said barge as to her condition and position and such men thereupon concluded to continue with the work of undertaking to stop the said leak believing that the said barge would sink into the mud and remain upright. As the tide continued to fall, the barge suddenly listed to one side away from the said dock and partially turned over. As the said Marshal Short and the said Gus Patterson undertook to escape from the hold of the said barge they were caught by the falling cargo of the said barge which consisted of wheat in sacks piled in tiers upon the deck of the said barge, and were
10 crushed and killed. A large amount of the said cargo was thrown into the water and the barge was subjected to such a severe strain that her house was carried away and her hull damaged. The said William Boyce now claims to have been thrown down and injured as a result of the listing of the said barge.

The said accident happened and the losses, damage, injury and destruction above set forth were occasioned, done and occurred without the fault, privity or knowledge of your petitioners or either of them, and were due solely to the perils of the sea. Nevertheless, the administrators of the said Marshal Short and of the said Gus Patterson and the firm of Balfour, Guthrie & Co., the owners of the cargo of the said barge Columbia, are threatening to and will, unless restrained, as hereinafter prayed, commence actions against your petitioners or one of them to recover damages claimed to be suffered by the said accident. On or about the 15th day of November, 1892, the said William Boyce commenced an action in the circuit court of the State of Oregon for Multnomah county, against your petitioners, to recover damages alleged to be fifteen thousand ($15,000.00) dollars for injuries claimed to have been suffered by him and the action is still pending, plaintiff's attorney being Charles F. Lord whose office is in the city of Portland, State of

Oregon. Said claims so made by the said persons above mentioned, and each of them, are largely in excess of the value of the said barge in the condition in which she was after the said accident and damaged on the 22nd day of October, 1892, when her
11 said voyage was completed. Your petitioners state that there was no freight money due or owing to the said barge or to either of your petitioners on account of the said transportation, and there was no freight then pending in connection with the said barge.

Your petitioners and each of them desire to contest their liability for the loss, destruction, damage and injury occasioned by the said accident, and also to claim the benefit of the limitation of liability provided in the third and fourth sections of the act of Congress entitled "An act to limit the liability of ship-owners, and for other purposes," passed March 3d, 1851, now embodied in sections 4283 and 4285 of the Revised Statutes of the United States and the various statutes in addition thereto and amendatory thereof and particularly the act of Congress of June 19, 1886, and to that end desire an appraisement to be made and had of the amount or value of the interest of each of the said persons and said barge Columbia, in the condition in which she was after said accident and damage on October 22, 1892, and of her freight then pending, and for that purpose your petitioner asks that said barge Columbia be examined and her value ascertained by a commissioner of the circuit court or by such other means as the court shall direct.

Fifth. Your petitioners and each of them further state the facts and circumstances by which exemption from liability is claimed in addition to the facts hereinbefore alleged.

Your petitioner, The Oregon Railway and Navigation Company, states that it was authorized by law to make, execute and
12 deliver to the said Oregon Short Line & Utah Northern Railway Company a lease of the said barge Columbia for the term and period of ninety-nine (99) years from and after January 1, 1887, and that the lease was executed in writing between the said companies whereby all the right, title and interest of the said Oregon Railway & Navigation Company in and to the said barge was transferred to the said Oregon Short Line & Utah Northern Railway Company for a period of ninety-nine (99) years from and after January 1, 1887. Said lease being executed by both of the parties thereto in pursuance of law, and as the said parties thereto were authorized by their charters to do. That under and by virtue of the said lease, the said Oregon Short Line & Utah Northern Railway Company entered into the use and enjoyment of the said barge, and that the said barge at the time of the accident hereinbefore mentioned was under the sole and exclusive management, operation and control of the said Oregon Short Line & Utah Northern Railway Company, and that none of the men on board of the said barge were officers, agents or employees of your petitioner, The Oregon Railway & Navigation Company. That the said wheat belonging to Balfour, Guthrie & Co., was being carried by the Oregon Short Line & Utah Northern Railway Company under and by virtue of a bill of lading

or shipping receipt issued by the said company, and was not being carried, handled or controlled in any manner whatsoever by your petitioner, The Oregon Railway & Navigation Company.

13 Your petitioner, The Oregon Short Line & Utah Northern Railway Company, states that the said barge, Columbia, was in all respects sound, staunch, seaworthy and was properly manned, equipped and provided for the voyage in which she was engaged, and was under the charge and management of proper and suitable officers. That the captain of the said barge Columbia executed and delivered to the said Balfour, Guthrie & Co. a shipping receipt or bill of lading for all the wheat carried upon the said barge, to wit: eighty-eight hundred and ninety-eight (8,898) sacks, and the said shipping receipts contained the following provision, to wit:

"In consideration of the reduced rate at which the articles covered by this receipt are carried, it is agreed by the undersigned for and on behalf of the owner of the property that the Oregon Short Line & Utah Northern Railway Company shall not be responsible for any injury or damage to the property described in this receipt not caused by the actual negligence of the said company or its agents."

That the said agreement contained in the said receipt was signed by the said Balfour, Guthrie & Co., the owners of the said wheat, and the said wheat was being carried under the terms and provisions of the said shipping receipt and not otherwise. That the injury to the said wheat did not occur by reason of any negligence on the part of either of your petitioners or of any of their agents or servants, but it was caused solely by a peril over which your petitioners, and each of them, had no control, and which injury could not have been prevented by the exercise of any care on the part of your petitioners, their officers, agents or employees.

14 Your petitioners further say that the said Marshal Short and the said William Boyce and the said Gus Patterson, and each of them, well knew the danger connected with working in the hold of the said barge, and that the said danger was one of the risks of their employment voluntarily assumed by them, and each of them had full knowledge of the danger connected therewith. And that the injuries resulting to the said William Boyce, and to the estates of the said Marshal Short and the said Gus Patterson, were not caused by any negligence or lack of care or skill on the part of your petitioners or any of their officers, agents or employees, and were the results solely of the contributory negligence of the said Marshal Short, said William Boyce and the said Gus Patterson, and each of them, in entering and remaining in the hold of the said barge, well knowing the danger connected with working therein.

Sixth. That the said barge Columbia has not been libelled or arrested in any court for any of said injuries, loss or destruction, but that your petitioners have been sued within the district of Oregon in the circuit court of Multnomah county aforesaid.

Wherefore, your petitioners pray that this honorable court will

be pleased to cause due appraisement to be had of the value of the said barge Columbia, in the condition in which she was immediately after said accident, and is now and, upon the ascertainment of such value, make an order for the payment thereof into court, or for the giving of a stipulation, with sureties for the payment thereof into court, whenever the same shall be ordered, and will
15 issue a monition against all persons claiming damages for any loss, destruction or damage or injury occasioned by said accident, citing them to appear before this court and make due proof of their respective claims at a time to be therein named; as to all of which claims your petitioners, and each of them, will contest their liability independently of the limitation of liability claimed under the acts and statutes aforesaid.

And the court will designate a commissioner before whom proof of all claims presented in pursuance of such monition shall be made; and that upon the giving in of the report of said commissioner, and upon the hearing of the cause, if it shall appear that your petitioners are not liable for such loss, destruction, damage and injury, it may be so finally decreed by this court. And that in the meantime until the final judgment of the court shall be rendered herein, this court will make an order restraining the further prosecution of all or any suit or suits against your petitioners, or either of them, in respect to any claim or claims, particularly by the said William Boyce, who brought suit in the circuit court of the State of Oregon for Multnomah county, as hereinbefore stated, and your petitioners will ever pray.

THE OREGON RAILWAY & NAVIGATION CO.,
By W. W. COTTON, *Secretary.*
THE OREGON SHORT LINE & UTAH NORTHERN R'Y CO.,
By W. W. COTTON, *Gen'l Att'y.*
W. W. COTTON & ZERA SNOW,
*Proctors for Petitioners.*

16 UNITED STATES OF AMERICA, }
*District of Oregon,* } *ss:*

I, W. W. Cotton, being duly sworn, depose and say that I am the secretary of the Oregon Railway and Navigation Company, one of the petitioners in the above-entitled petition; that I know the facts stated in the foregoing petition, and the same *is* true as I verily believe.

W. W. COTTON.

Subscribed and sworn to before me this 26th day of November, A. D. 1892.

[SEAL.]

J. M. LONG,
*Notary Public for Oregon.*

(Endorsed:) Filed Nov. 29, 1892. R. B. Lamson, clerk.

And afterwards, to wit, on the 29th day of November, 1892, there was duly filed in said court a stipulation for costs in words and figures as follows, to wit:

In the District Court of the United States for the District of Oregon.

*Libel and Petition of the Oregon Railway and Navigation Company and the Oregon Short Line and Utah Northern Railway Company.*

Whereas a libel was filed in this court on November 29, 1892, by the Oregon Railway and Navigation Company and the Oregon Short Line and Utah Northern Railway Company for limitation of liability for injuries and damages suffered by the persons in
17 connection with the barge Columbia on the 21st and 22d days of October, 1892, for the reasons and causes in said libel mentioned; and the said libellants and J. T. Gregg, surety, the parties hereto hereby consenting and agreeing that in case of default or contumacy on the part of the libellants or the surety, execution may issue against their goods, chattels and lands for the sum of two hundred and fifty dollars.

Now therefore it is hereby stipulated and agreed for the benefit of whom it may concern that the stipulators undersigned shall be and are bound in the sum of two hundred and fifty dollars, conditioned that the libellants above named shall pay all such costs as shall be awarded against them or either of them by this court or in case of appeal by the appellate court.

THE OREGON RAILWAY & NAVIGATION COMPANY,
By W. W. COTTON, *General Attorney.*
THE OREGON SHORT LINE & UTAH NORTHERN RAILWAY COMPANY,
By W. W. COTTON, *Its Attorney.*
J. T. GREGG.

Taken and acknowledged before me—
R. B. LAMSON, *Clerk.*

DISTRICT OF OREGON, *ss:*

J. T. Gregg, being duly sworn, deposes and says each for himself that he resides in the district of Oregon, and that he is a
18 householder in said district, and is worth the sum of five hundred dollars over and above all his just debts and liabilities.

J. T. GREGG.

Subscribed and sworn to before me this November 29, 1892.
R. B. LAMSON, *Clerk.*

(Endorsed:) Filed Nov. 29, 1892. R. B. Lamson, clerk.

And afterwards, to wit, on Tuesday, the 29th day of November, 1892, the same being the eleventh judicial day of the regular No-

vember term of said court—present, the Honorable Matthew P. Deady, United States district judge, presiding—the following proceedings were had in said case, to wit:

In the District Court of the United States for the District of Oregon.

In the Matter of the Libel and Petition of the Oregon Railway & Navigation Company and of the Oregon Short Line and Utah Northern Railway Company as Owner and Lessee of the Barge Columbia. No. 3163.

NOVEMBER 29, 1892.

Now, at this day, come the petitioners above named by Mr. W. W. Cotton, of counsel, and present to the court their petition showing that said petitioners have been sued as the owner and lessee of the barge Columbia by one William Boyce, who claims to have been injured on the said barge on October 22, 1892, and that other
19 actions are threatened against said petitioners, and that the said barge is not sufficient to make compensation to each of the persons having claims against the same, and that such loss, destruction, damage, and injury was done, occasioned, and incurred without the privity or knowledge of such owner and lessee, and that said petitioners desire to claim the benefit of the limitation of liability provided for in the third and fourth sections of the act of Congress entitled "An act to limit the liability of ship-owners, and for other purposes," passed March 3, 1851, and embodied in section 4283 to 4285 of the Revised Statutes of the United States, and the various statutes in addition thereto and amendatory thereof, and also desire to contest the liability of the said petitioners, and the liability of the said vessel for said loss, destruction, damage, and injury independently or the limitation of liability claimed under the said act; and said libel and petition also stating the facts and circumstances on which such exemption from and limitation of liability are claimed, and praying proper relief in the premises in that behalf, and the said owner and lessee having prayed for an appraisement of the said barge as provided in said act and the rules of the Supreme Court of the United States made in pursuance thereof, it is ordered and adjudged that F. S. Bosworth and J. F. Steffen be, and they are hereby appointed appraisers to appraise the value of the said barge Columbia, her tackle, apparel and furniture, as the same was at the end of her voyage at Astoria, Oregon, on October 22, 1892, after the injury and damage set forth and alleged in the said libel and petition, and also to determine
20 the value of her freight then pending, if any, and to return the appraisement made to the clerk of this court forthwith.

(Signed) DEADY, *J.*

(Endorsed:) Filed Nov. 29, 1892. R. B. Lamson, clerk.

And afterwards, to wit: on the 6th day of December, 1892, there was duly filed in said court an oath of appraisers in words and figures as follows, to wit:

In the District Court of the United States for the District of Oregon.

In the Matter of the Libel and Petition of the Oregon Railway & Navigation Company and of the Oregon Short Line & Utah Northern Railway Company as Owner and Lessee of the Barge Columbia. No. 3163.

*Oath of Appraisers.*

UNITED STATES OF AMERICA, } ss:
*District of Oregon,* }

We, F. S. Bosworth and J. F. Steffen, the undersigned, having been appointed appraisers to appraise the value of the barge Columbia, do solemnly swear that we will faithfully appraise the same, to the best of our skill and ability.

F. S. BOSWORTH.
JOHN F. STEFFEN.

21 Subscribed and sworn to before me this 3d day of December, 1892.

[SEAL.] WALLACE McCAMANT,
*Notary Public for Oregon.*

(Endorsed:) Filed Dec. 6, 1892. R. B. Lamson, clerk.

And afterwards, to wit, on the 6th day of December, 1892, there was duly filed in said court a report of appraisers in words and figures as follows, to wit:

In the District Court of the United States for the District of Oregon.

In the Matter of the Libel and Petition of the Oregon Railway & Navigation Company and of the Oregon Short Line and Utah Northern Railway Company as Owner and Lessee of the Barge Columbia. No. 3163.

*Report of Appraisers.*

We, the undersigned, having been duly appointed and sworn as appraisers to appraise the barge Columbia, her tackle, apparel and furniture, as she lay at Astoria after the accident on the 22d day of October, 1892, and also the amount of freight then pending, do report that we have examined and appraised the said barge, her tackle, apparel and furniture as she lay at Astoria after the accident, on the 22nd day of October, 1892, and do find that the said
22 barge, her tackle, apparel and furniture, at the said date, were and are worth the sum of one hundred dollars.

And we do further find that the value of all freight by the said barge earned up to the date of the said accident and then unpaid, being the freight pending, was and is worth the sum of $0.00, the said freight not having been delivered according to contract, all of which is respectfully submitted.

F. S. BOSWORTH.
JOHN F. STEFFEN.

UNITED STATES OF AMERICA, }
*District of Oregon,* } ss:

We, F. S. Bosworth and J. F. Steffen, being severally sworn, each for himself says, that the foregoing report is true, as we verily believe.

F. S. BOSWORTH.
J. F. STEFFEN.

Subscribed and sworn to before me this 6th day of December, 1892.

[SEAL.] WALLACE McCAMANT,
*Notary Public for Oregon.*

(Endorsed:) Filed Dec. 6, 1892. R. B. Lamson, clerk.

And afterwards, to wit, on Tuesday, the 6th day of December, 1892, the same being the 14th judicial day of the regular November term of said court—present, the Honorable Matthew P. Deady, United States district judge, presiding—the following proceedings were had in said case, to wit:

23 In the District Court of the United States for the District of Oregon.

In the Matter of the Libel and Petition of the Oregon Railway & Navigation Company and of the Oregon Short Line & Utah Northern Railway Company as Owner and Lessee of the Barge Columbia. No. 3163.

DECEMBER 6, 1892.

Now, at this day, come the petitioners by Mr. Wallace McCamant, of counsel, and present to the court the report of the appraisers, heretofore appointed to appraise the value of the barge Columbia, and move the court that they be allowed to file a stipulation for the value of said barge as determined by such appraisement, and it appearing to the court that said appraisers found the value of said barge to be one hundred dollars, it is ordered that said petitioners be, and they are hereby allowed to file such stipulation in said sum of one hundred dollars.

And afterwards, to wit, on the 6th day of December, 1892, there was duly filed in said court a stipulation for appraised value in words and figures as follows, to wit:

24 In the District Court of the United States for the District of Oregon.

In the Matter of the Petition of the Oregon Railway & Navigation Company as the Owner of the Barge Columbia and the Oregon Short Line & Utah Northern Railway Company as the Lessee Thereof.

Whereas a libel and petition were filed in the district court of the United States, for the district of Oregon, on the 29th day of Novem-

ber, 1892, by the Oregon Railway & Navigation Company, as the owner of the barge Columbia, and by the Oregon Short Line & Utah Northern Railway Company, as the lessee thereof, praying for a limitation of the liability of each of the said companies concerning the loss, destruction, damage and injury occasioned by the disaster to the said barge for the reasons and causes in said libel and petition mentioned, and praying that the value of the said barge Columbia and of her freight, then pending, might be determined by an appraisement, and

Whereas afterwards F. S. Bosworth and J. F. Steffen were appointed by the order of this court as such appraisers and the appraisement was duly had by the said appraisers and the value of the said barge Columbia and her freight then pending having been fixed at the sum of one hundred dollars as appears by the appraisement now on file in said court, and the parties hereto hereby consenting and agreeing that in case of default or contumacy on
25 the part of the claimant or its sureties execution for the above appraised value with interest thereon from this date may issue against their goods, chattels and lands:

Now therefore the condition of this stipulation is such that if the stipulators shall at any time upon the interlocutory or final order or decree of the said district court or of any appellate court to which the above-named suit may proceed, and upon notice of such order or decree to the proctors for the said petitioners and libellants abide by and pay the money awarded by the final decree rendered by this court or the appellate court, if any appellate intervene, then this stipulation to be void, otherwise to remain in full force and effect.

OREGON RAILWAY & NAVIGATION COMPANY,
By SNOW AND McCAMANT, *Its Proctors.*
OREGON SHORT LINE & UTAH NORTHERN R'Y CO.,
By SNOW AND McCAMANT, *Its Proctors.*

FRANK DEKUM.
H. C. STRATTON.

Taken and acknowledged this 6th day of December, 1892, before me—

[SEAL.] WALLACE McCAMANT,
*Notary Public.*

UNITED STATES OF AMERICA, *District of Oregon,* } *ss:*

Frank Dekum and H. C. Stratton, parties to the above
26 stipulation, being duly sworn, depose and say that they reside in the district of Oregon and are householders therein, and each says that he is worth the sum of one hundred dollars over and above his just debts and liabilities.

FRANK DEKUM.
H. C. STRATTON.

Sworn to before me this 6th day of December, 1892.
[SEAL.] WALLACE McCAMANT,
*Notary Public.*

(Endorsed:) Filed Dec. 6, 1892. R. B. Lamson, clerk.

And afterwards, to wit, on Thursday, the 8th day of December, 1892, the same being the 15th judicial day of the regular November term of said court—present, the Honorable Matthew P. Deady, United States district judge, presiding—the following were had in said case, to wit:

In the Matter of the Petition of the Oregon Railway and Navigation Company as the Owner of the Barge Columbia and the Oregon Short Line and Utah Northern Railway Company as the Lessee Thereof.

On reading the libel and petition herein verified and filed on the 29th day of November for the limitation of the liability of the petitioners above named, and it appearing therefrom that various losses, injuries and damages have been suffered by various persons
27 on board the barge Columbia, at Astoria, Oregon, on the 22d day of October, 1892, and that the cargo of wheat then on the said barge had become greatly injured, and that the said barge was damaged as stated in the said libel; and said petitioners, as the owner and lessee of the said barge Columbia, contesting their liability and the liability of the said barge for the said loss, destruction, damage and injury independently of the limitation of liability claimed, and the said libel and petition having stated the facts and circumstances by reason of which exemption from and limitation of liability are claimed and the amount or value of the interest of the petitioners in the said barge Columbia, and immediately after the accident by her sustained on the 22d day of October, 1892, having been duly appraised at the sum of one hundred dollars, as appears from the order entered herein on the 6th day of December, 1892, and there being no freight pending on the voyage of the said barge on the said 22d day of October, 1892, and the petitioners having duly given a stipulation with sureties for the payment of the said amount into court whenever the same shall be ordered, and the stipulation having been duly approved by the court, now, on motion of W. W. Cotton and Zera Snow, proctors for the petitioners, it is ordered that a monition issue out of and under the seal of this court against all persons claiming damages for any loss, destruction, damage or injury occasioned by the disaster to the said barge Columbia referred to in the said petition, citing them to appear before this court and make due proof of their respective claims at or before the return day in April,
28 at eleven o'clock in the forenoon, and that Mr. Paul R. Deady, Esq., a commissioner of the United States circuit court, is hereby designated as the commissioner before whom such claims shall be presented in pursuance of such monition.

And it is ordered that notice of such monition be given by the

United States marshal for this district in a newspaper for the space of fourteen days, as in other cases, and that a copy of such monition and of this order be personally served on the attorneys, proctors and solicitors of record for the plaintiffs in each or any suit brought and pending at this date of this order in any court of the United States against the Oregon Railway & Navigation Company or the Oregon Short Line & Utah Northern Railway Company to recover for any such damages, said service to be made within ten days after the entry of this order.

It is further ordered that the prosecution of all and any suit or suits, actions or proceedings against the said Oregon Short Line & Utah Northern Railway Company or the Oregon Railway & Navigation Company in respect to any claim for damages for any loss, destruction, damage or injury occasioned on the 21st and 22d days of October, 1892, or her loss and destruction, be, and the same is hereby restrained.

It is further ordered that any person claiming damages aforesaid who shall have presented his claim to said commissioner under oath shall be at liberty on or before the 29th day of December, 1892, or within such other time as the court may grant, to answer the said libel and petition herein and to contest the right of the petitioners or either of them, either to the limitation of liability or exemption from liability or to both of said reliefs as prayed for in said petition.

December 8th, 1892.

(Signed) DEADY, *J.*

UNITED STATES OF AMERICA, } ss:
*District of Oregon,* }

Due service of the within order for monition is hereby admitted on behalf of Melvina Short, administratrix, by receiving a copy of the same at Portland this 8th day of December, 1892.

J. F. & E. B. WATSON,
*Attorneys for Malvina Short.*

UNITED STATES OF AMERICA, } ss:
*District of Oregon,* }

Due service of the within order for monition is hereby admitted on behalf of William Boyce, by receiving a copy of the same at Portland, this — day of December, 1892.

CHAS. F. LORD,
*Attorney for William Boyce.*

(Endorsed:) Filed Dec. 8, 1892. R. B. Lamson, clerk.

And afterwards, to wit, on the 8th day of December, 1892, there was issued out of said court a monition in words and figures as follows, to wit:

DISTRICT OF OREGON, ss:

In obedience to the within monition in the matter of the petition and libel of the Oregon Railway & Navigation Company and of the Oregon Short Line & Utah Northern Rail-

way Company, for limitation of liability of each of said companies by the loss, destruction and damage, I caused the said monition to be published in the *Oregonian*, a daily paper in the city of Portland and State of Oregon for fifteen successive days from the 9th day of December, 1892, to the 23d day of December, 1892; and on the 8th day of December, 1892, J. F. and E. B. Watson, the attorneys for Melvina Short, administratrix of Short, accepted service of the same; and on the — day of December, 1892, Charles F. Lord, the attorney for William Boyce, accepted service thereof for William Boyce; and have given due notice to all persons claiming damages for any loss, destruction, damages or injury occasioned by the said disaster, to the barge Columbia on the 21st and 22d days of October, 1892, to appear before this court to make due proof of their respective claims before Paul R. Deady, Esq., a commissioner of the United States circuit court, at his office in the city of Portland, on or before the return day in April, at 11 o'clock in the forenoon.

Dated this 9th day of January, 1893.

L. T. BARIN,
*United States Marshal,*
By J. T. GREGG,
*Chief Deputy.*

STATE OF OREGON, } ss:
*County of Multnomah,* }

I, Chas. A. Morden, being first duly sworn, say that I am
31 foreman of the printer of the Oregonian newspaper; that said Oregonian is a newspaper published in said county and State, and has a general circulation therein; and that an advertisement, of which the annexed marked "A" is a true copy, was published in said Oregonian for fifteen successive days from the 9th day of December, A. D. 1892, to the 23rd day of December, A. D. 1892, inclusive; and that during said term said paper was regularly circulated.

CHAS. A. MORDEN, *Foreman.*

Subscribed and sworn to before me, a notary public in and for the county of Multnomah, State of Oregon, this 29th day of December, A. D. 1892.

[SEAL.]

GEO. H. BERGER,
*Notary Public for Oregon.*

"A."

*Monition.*

UNITED STATES OF AMERICA, } ss:
*District of Oregon,* }

The President of the United States of America to the United States marshal for the district of Oregon, Greeting:

Whereas a libel and petition was filed in the district court of the United States for the district of Oregon on the 29th day of November, 1892, by the Oregon Railway & Navigation Company as the

owner of the barge "Columbia" and by the Oregon Short Line & Utah Northern Railway Company as the lessee thereof, praying for a limitation of the liability of each and both of said companies concerning the loss, destruction, damage and injury occa-
32 sioned by the disaster to the said barge "Columbia" on the 22d and 21st days of October, 1892, for the reasons and causes in said libel and petition mentioned, and praying a monition of the said court in that behalf to be issued, and that all persons claiming damages for any such loss, destruction, damage or injury may be cited to appear before said court and make due proof of their respective claims, and all proceedings being had that — it shall appear that the said petitioners or either of them are not liable for any such loss, destruction, damage or injury, it may be so finally decreed by this court; and, whereas, the value of the interest of the said petitioners and each of them in the said barge "Columbia" on the said 22d day of October, 1892, and a stipulation for the payment into court of the value of the interest of the said petitioners and each of them in the said barge has been given to the said court as ordered, that a monition issue against all persons claiming damage for said loss, destruction, damage or injury, citing them to appear and make due proof of their respective claims: you are therefore so commanded to cite all persons claiming damages for any loss, destruction, damage or injury occasioned by said disaster to the said barge "Columbia" to appear before said court and make due proof of their respective claims before Mr. Paul R. Deady, Esq., a commissioner of the United States circuit court, at his office in the city of Portland, on or before the return day in April at eleven o'clock in the forenoon. And what you shall have done in the premises do you then make return thereof to this court, together with this writ.

33 Witness the Hon. Matthew P. Deady, judge of the said court, at the city of Portland, in the district of Oregon, this 8th day of December, in the year of our Lord one thousand eight hundred and ninety-two, and of our Independence the one hundred and seventeenth year.

[SEAL.]

R. B. LAMSON, *Clerk.*
W. W. COTTON,
SNOW & McCAMANT,
*Proctors for Libellant and Petitioner.*

UNITED STATES OF AMERICA, } ss:
*District of Oregon,* }

The President of the United States of America to the United States marshal for the district of Oregon, Greeting:

Whereas a libel and petition was filed in the district court of the United States for the district of Oregon on the 29th day of November, 1892, by the Oregon Railway & Navigation Company as the owner of the barge "Columbia," and by the Oregon Short Line & Utah Northern Railway Company as the lessee thereof, praying for a limitation of the liability of each and both of said companies

concerning the loss, destruction, damage and injury occasioned by the disaster to the said barge Columbia on the 22d and 21st days of October, 1892, for the reasons and causes in said libel and petition mentioned, and praying a monition of the said court in that behalf to be issued, and that all persons claiming damages for any such loss, destruction, damage or injury may be cited to appear
34 before said court and make due proof of their respective claims, and, all proceedings being had, that if it shall appear that the said petitioners, or either of them are not liable for any such loss, destruction, damage or injury, it may be so finally decreed by this court; and

Whereas the value of the interest of the said petitioners and each of them, in the said barge Columbia has been duly appraised at the sum of one hundred dollars, including the freight pending on the voyage of the said barge "Columbia" on the said 22d day of October, 1892, and a stipulation for the payment into court of the value of the interest of the said petitioners and each of them in the said barge has been given to the said court as ordered, that a monition issue against all persons claiming damages for such loss, destruction, damage or injury, citing them to appear and make due proof of their respective claims; you are therefore so commanded to cite all persons claiming damages for any loss, destruction, damage or injury occasioned by said disaster to the said barge Columbia, to appear before said court and make due proof of their respective claims before Mr. Paul R. Deady, Esq., a commissioner of the United States circuit court, at his office in the city of Portland on or before the return day in April at eleven o'clock in the forenoon. And what you shall have done in the premises do you then make return thereof to this court, together with this writ.

Witness the Hon. Matthew P. Deady, judge of the said court, at the city of Portland in the district of Oregon, this 8th day of December, in the year of our Lord one thousand eight hundred
35 and ninety-two, and of our Independence the one hundred and seventeenth year.

[SEAL.]

R. B. LAMSON, *Clerk.*
W. W. COTTON,
SNOW & McCAMANT,
*Proctors for Libellant and Petitioner.*

UNITED STATES OF AMERICA, }
*District of Oregon,* } ss:

Due service of the within monition is hereby accepted on behalf of Melvina Short, administratrix, by receiving a copy of the same at Portland, this 8th day of December, A. D. 1892.

J. F. & E. B. WATSON,
*Attorneys for Melvina Short.*

UNITED STATES OF AMERICA, } ss:
*District of Oregon,* }

Due service of the within monition is hereby accepted on behalf of William Boyce, by receiving a copy of the same at Portland, this — day of December, A. D. 1892.

CHAS. F. LORD,
*Attorney for William Boyce.*

(Endorsed:) Returned and filed January 19, 1893. R. B. Lamson, clerk.

And afterwards, to wit, on the 22d day of December, 1892, there was duly filed in said court an answer of Balfour, Guthrie & Co., in words and figures as follows, to wit:

36 In the District Court of the United States for the District of Oregon. In Admiralty.

The Barge Columbia; The Oregon Railway & Navigation Company and The Oregon Short Line & Utah Northern Railway Company, Libellants and Petitioners.

Robert Balfour, Stephen Williamson, Alexander Guthrie, Robert Brodie Forman, R. Bruce and Walter J. Burns, partners doing business in the city of Portland, and elsewhere, under the firm name and style of Balfour, Guthrie & Company, exhibit this their answer to the libel and petition of the Oregon Railway & Navigation Company and the Oregon Short Line & Utah Northern Railway Company herein, and answer and allege as follows:

1. Admit that article first of said libel and petition is true.

2. Admit that article second of said libel and petition is true.

3. Admit that on or about the 21st day of October, 1892, the barge or lighter "Columbia," referred to in said libel, left Portland, Oregon, having on board a cargo of wheat to be transported from Portland, Oregon, to Astoria, Oregon, said wheat being part of the cargo of the British ship "Westgate," and destined to be transported by means of said ship and lighter from Portland, Oregon, to Liverpool, England, substantially as alleged in said libel and petition; but deny that said barge was seaworthy or in good

37 order or condition, or that the said cargo of wheat was properly loaded thereon. On the contrary, these respondents allege the truth to be that said barge was very unseaworthy, and was in bad order and condition, at said time, and that these facts were, at said time, well known to the owners of said barge, and their officers, agents and employees; and that said cargo of wheat was carelessly, negligently, and improperly loaded on said barge; and that said barge was at said time very much overloaded beyond her carrying capacity, even had she been thoroughly sound, staunch and seaworthy; and that said barge was at said time improperly and insufficiently manned and equipped; and that the crew of said barge, at said time, were without the necessary skill and experience for the

business in which the said barge was engaged, as aforesaid. And respondents deny that all went well with the said barge or her said cargo until the said barge, on the night of the 21st of October, 1892, reached Astoria, Oregon. As to whether or not the said barge intended to tie up alongside the dock of the Oregon Railway & Navigation Company, respondents have no knowledge or information sufficient to form a belief. As to whether or not there was any float or pontoon in front of the dock of the Oregon Railway & Navigation Company at Astoria, Oregon, or as to whether or not the same floated nearly level with the water or otherwise, defendants have no knowledge or information sufficient to form a belief, and are
38 ignorant as to what was the nature, character or construction of said float or pontoon, and its dimensions, if any such float or pontoon there was; and respondents therefore call for proof as to all of said matters. As to whether or not the said float or pontoon had been recently or at all used for any purpose whatever, respondents have no knowledge or information sufficient to form a belief. Deny that by reason of the darkness of the night, or for any other reason, it was impossible for the pilot or captain in charge of the "Ocklahama," the steamboat towing the said barge, to see the said float or pontoon. Admit that said barge ran against some obstacle with sufficient force to break the stem and forefoot of said barge, and to start her timbers so that she commenced leaking; but as to whether or not the same was caused by any attempt to make a landing at said dock, or by runnin- against said float or pontoon, respondents have no knowledge or information sufficient to form a belief. And respondents allege the facts to be that the said towboat "Ocklahama" and the said barge were each of them so negligently and carelessly managed that said barge, at said time, had her bow stove in, and then and there commenced to fill rapidly. As to whether or not the persons in charge of said barge deemed it necessary or advisable to remove said barge into more shallow water, in order that the said barge and her cargo might be more conveniently saved, respondents have not sufficient knowledge or information to form a belief; but respondents allege that in so removing said barge, the libellants and petitioners herein were guilty of carelessness, negligence and unskillfulness. Admit that the said barge was taken be-
39 hind the said dock and placed alongside the rear portion thereof; but as to whether or not the men in charge of said barge made any examination to ascertain her condition, or as to whether or not it was found that she would probably float if the pumps were used, or as to whether or not the pumps were used or the leak kept under control, as alleged in said libel and petition, respondents have no knowledge or information sufficient to form a belief. As to whether or not, at the time the pumps were so working, as alleged in said libel and petition, no part of the cargo of said barge was injured, respondents have no knowledge or information sufficient to form a belief. As to whether or not the men in charge of said barge undertook to stop the leak by building a bulkhead, and as to what was their intention in building such

bulkhead, if any was built, respondents have no knowledge or information sufficient to form a belief. As to whether or not for any purpose three men among others entered the hold of the said barge or as to whether or not these men were Marshal Short, the captain of the "Ocklahama," and William Boyce, a deck hand on the "Ocklahama," and one Gus Patterson, or as to whether or not the said Gus Patterson was a deck hand upon the said barge or on the said "Ocklahama," respondents have no knowledge or information sufficient to form a belief; but respondents admit that for some purpose unknown to respondents the said Marshal Short and one other man whose name and occupation are unknown to respondents entered the hold of said barge, and admit that the said Short was captain of the said "Ocklahama." As to whether or not the said

40 barge touched ground while said or any men were in the hold thereof respondents have no knowledge or information sufficient to form a belief; but they admit that the tide was ebbing at said time. As to whether or not any examination was made by the men in charge of said barge as to her condition or position or otherwise, or as to whether or not such men concluded to continue the work by trying to stop the said leak, or as to whether or not the said or any men believed that the barge would sink into the mud and remain upright respondents have no knowledge or information sufficient to form a belief. Admit that as the tide continued to fall the barge listed to one side and partially turned over; but deny that it did so suddenly. As to whether or not it so listed and partially turned over away from said dock respondents have no knowledge or information sufficient to form a belief. Admit that the said Marshal Short and one other man was killed by the falling of the cargo of the barge, consisting of wheat in sacks piled in tiers upon the deck of the barge, but as to whether or not they were killed while endeavoring to escape from the hold of the barge respondents have no knowledge or information sufficient to form a belief. Admit that a large amount of the said cargo was thrown into the water, but deny that the barge was subjected to any severe strain. Admit that her house was carried away and her hull damaged. But respondents allege that it is nothing unusual for barges such as the said barge "Columbia" to take the ground when loaded, and that the strain to which the said barge was thereby at said time subjected was not *not* a severe or unusual strain, and would not have

41 injured said barge in any respect had she been sound, staunch and seaworthy. Deny that the said accident happened or that the losses, damage, injury or destruction, as set forth in said libel and petition, were occasioned or done or occurred without the fault, privity or knowledge of said libellants and petitioners, The Oregon Railway & Navigation Company and The Oregon Short Line & Utah Northern Railway Company, or either of them; but respondents, on the contrary, allege the facts to be that the unseaworthiness and old and rotten condition of said barge and the overloading of same, and the carelessness, negligence and lack of skill and competency on the part of the crew of said barge and the captain and crew of the said "Ocklahama" were each and all of them

the causes of said loss, damage, injury or destruction, and were each and all of them with the full knowledge of the libellants and petitioners and each of them; and respondents deny that the said loss, damage, injury or destruction, as described in said libel and petition, or any loss, damage, injury or destruction, in this behalf, were due solely or at all to the perils of the sea. As to whether or not there was no freight money due or owing to the said barge or to either of said petitioners and libellants, on account of the transportation described in said libel and petition,—or as to whether or not there was no freight then pending in connection with the said barge,—respondents have no knowledge or information sufficient to form a belief. Deny that none of the men on board of the said barge were officers, agents or employees of the said Oregon
42 Railway & Navigation Company. Deny that the said wheat being carried for these respondents was not being carried, handled or controlled in any manner by the said Oregon Railway & Navigation Company. Deny that the said barge Columbia was in all respects, or in any respect, sound, staunch, seaworthy, or properly manned, equipped, or provided for the voyage in which she was engaged, or was under the charge or management of proper or suitable officers. Deny that the injury to the said wheat of respondents did not occur by reason of any negligence on the part of either of the said libellants and petitioners, or their agents or servants; and deny that said loss was caused solely or at all by a peril over which libellants and petitioners or either of them had no control; and deny that said injury could not have been prevented by the exercise of care on the part of said libellants and petitioners, or their officers, agents, or employees. Admit that the said Marshal Short, William Boyce, and Gus Patterson, and each of them, well knew the danger connected with working in the hold of said barge; but deny that the injuries resulting to the said William Boyce and to the estates of the said Marshal Short and the said Gus Patterson were not caused by any negligence or lack of care or skill on the part of said petitioners or any of their officers, agents or employees.

Wherefore respondents pray that the order heretofore made herein, directing that an appraisement of the value of the said barge "Columbia" be made, and that monition issue against all persons claiming damages for said loss, destruction, damage or injury
43 occasioned as aforesaid, be vacated and set aside; and that respondents be decreed to recover from the said libellants and petitioners the full amount of their damages in this behalf sustained, together with their costs and disbursements herein; and for such other, further and different relief as to this honorable court shall seem meet.

WILLIAMS & WOOD,
*Proctors for Respondents.*

DISTRICT OF OREGON, } ss:
*County of Multnomah,* }

I, W. J. Burns, being duly sworn, say I am one of the respondents above named and the foregoing answer is true as I verily believe.

W. J. BURNS.

Subscribed and sworn to before me this 20th day of December, 1892.

[SEAL.] T. W. LONDON,
*Notary Public for Oregon.*

Due service of the within answer by certified copy as prescribed by law, is hereby admitted at Portland, Oregon, December 21st, 1892.

SNOW & McCAMANT,
*Proctors for the O. R. & N. Co. and the O. S. L. & U. N. R'y Co.*

(Endorsed:) Filed Dec. 22, 1892. R. B. Lamson, clerk.

And afterwards, to wit, on the 28th day of December, 1892, there was duly filed in said court a stipulation in words and figures as follows, to wit:

44 In the District Court of the United States for the District of Oregon. In Admiralty.

The Barge "Columbia;" Oregon Railway & Navigation Co. and Oregon Short Line & Utah Northern Railway Company, Libellants and Petitioners.

It is hereby stipulated by and between the proctors for Robert Balfour, Stephen Wilson, Alexander Guthrie, Robert Brodie Forman, R. Bruce, and Walter J. Burns, partners, doing business under the firm name of Balfour, Guthrie & Co., and the proctors for the Oregon Railway & Navigation Company, and the Oregon Short Line & Utah Northern Railway Company, that the said Oregon Railway & Navigation Company and the Oregon Short Line & Utah Northern Railway Company may have until the 15th day of February, 1893, in which to plead or to proceed against the cross-libel filed herein by the said Balfour, Guthrie & Co., and may also have until the said 15th day of February to amend the petition and libel heretofore filed by the said Oregon Short Line & Utah Northern Railway Company and the said Oregon Railway & Navigation Company for a limitation of liability.

W. W. COTTON,
*Proctor for the Oregon Railway & Navigation Company and the Oregon Short Line & Utah Northern Railway Company.*
WILLIAMS & WOOD,
*Proctors for Balfour, Guthrie & Co.*

45 (Endorsed:) Filed Dec. 28, 1892. R. B. Lamson, clerk.

And afterwards, to wit, on the 29th day of December, 1892, there was duly filed in said court an answer of William Boyce, in words and figures as follows, to wit:

In the District Court of the United States for the District of Oregon.
In Admiralty.

The Barge "Columbia;" The Oregon Railway & Navigation Company and The Oregon Short Line & Utah Northern Railway Company, Libellants and Petitioners.

To the Honorable Matthew P. Deady, judge of the district court of the United States for the district of Oregon:

William Boyce exhibits this his answer to the libel and petition of the Oregon Railway & Navigation Co. and the Oregon Short Line & Utah Northern Co., and answers and alleges as follows:

1. Admits that article first of said libel and petition is true.
2. Admits that article second of said libel and petition is true.
3. Admits that on or about the 21st day of October, A. D. 1892, the barge or lighter "Columbia," referred to in said libel and petition, left Portland, Oregon, having on board a cargo of wheat to be transported by said barge from Portland, Oregon, to Astoria,
46 Oregon, said wheat being a part of the cargo of the British ship "Westgate," destined to Liverpool, England, but denies that said wheat was to be transported in said barge "Columbia" farther than Astoria, Oregon. Your respondent alleges the fact to be that said barge "Columbia" was not a seagoing craft, but used as a barge and lighter and entirely in the navigation of inland waters and rivers and always has been so used. Denies that said barge "Columbia" was seaworthy or in good order or condition, or that said cargo of wheat was properly loaded thereon; on the contrary, this respondent alleges the truth to be that said barge or lighter was very unseaworthy and was in bad order and condition at said time, and these facts were at said time well known to the owners of said barge, their lessees, their officers and agents, and that said cargo of wheat was carelessly, negligently and improperly loaded on said barge, and said barge at said time was very much overloaded and beyond its carrying capacity, even had said barge been thoroughly sound, staunch and seaworthy, and respondent denies that all went well with said barge until on the night of the 21st day of October, 1892, when it reached Astoria, Oregon, but on the contrary said barge, owing to its being overloaded with wheat beyond its carrying capacity, careened, rolled and pitched upon the entire voyage from Portland to Astoria, Oregon. As to whether or not said barge intended to tie up alongside the dock of the Oregon Railway & Navigation Co. this respondent has no knowledge sufficient to form a belief. Admits that a float or pontoon substantially as alleged in said libel and petition
47 was lying in the water in front of said dock for the purpose of preventing ships from chafing against the timbers of said

dock. Denies that by reason of the darkness of the night rendered it impossible for the pilot or captain in charge of the "Ocklahama," the steamboat towing said barge, to see said float or pontoon. Admit that said barge or lighter "Columbia" ran against said float or pontoon or some obstacle, but denies that it was with sufficient force to break the stem or forefoot of said barge had the same been sound and staunch. Denies that said leakage was wholly caused by said collision, or that said timbers started by reason of colliding with said float or pontoon, or that the same was caused by attempting to make a landing; but your respondent alleges the fact to be that said barge was so carelessly and negligently loaded and so old and rotten and unseaworthy that the same was unseaworthy and unmanageable. Admits that said barge was taken into more shallow water by order of the persons in charge of said barge. As to whether or not the persons in charge of said barge made examination to ascertain its condition, or as to whether it was found it would probably float if pumps were used, your respondent has not sufficient knowledge to form a belief. Admits that the pumps were used. Admits that the cargo was entirely upon the deck of said barge. Admits that the men in charge of said barge undertook to stop the leaking in said barge by building a bulkhead with sacks of wheat around said leak, and alleges that on or about 12 o'clock on the night of the 21st day of October, A. D. 1892, Marshal Short,

48 captain of the steamboat "Ocklahama," towing said barge, ordered your respondent, who was a deck hand on the said steamboat the "Ocklahama," to go to and on board said barge, and assist in building said bulkhead. Admits that in order to construct said bulkhead, it was necessary to go into the hold of said barge. Admits that said Marshal Short, Gus Peterson and your respondent went into the hold of said barge, for the purpose of building said bulkhead. Admits that the tide was ebbing at the time the said bulkhead was being so constructed, but as to whether said barge touched the ground, your respondent has not sufficient knowledge to form a belief. Alleges that it was nothing unusual for such a barge as the "Columbia" to take the ground or to suddenly list when loaded beyond its carrying capacity, and that the strain to which said barge was thereby at that time subjected was not severe or unusual and would not have injured said barge in any respect, had it been sound, staunch and seaworthy, or had it not been so negligently loaded. As to whether an examination was thereon made by the man in charge of said barge, as to her condition and position or that such men thereupon concluded to continue with the work of undertaking to stop the said leak or that they believed that said barge would sink into the mud and remain upright, your respondent has not sufficient to — form a belief. Admits that said barge suddenly listed to one side and away from said dock and partially turned over and sunk. Admits that said Marshal Short and Gus Peterson undertook to escape from the hold of said barge and that they were caught

by the falling cargo of the said barge, to wit, wheat in
49 sacks piled in tiers upon the deck of said barge and were crushed and killed. Admits that a large amount of said cargo was thrown into the water and the said barge was subjected — such a severe strain that its house was carried away, and her hull injured, but alleges that any damage or injury said barge may have or did receive was caused wholly by the negligent loading of the same and was wholly due to the rotten and imperfect condition of the said barge "Columbia" and not otherwise. And your respondent alleges the facts to be that while he was in the hold of said barge as ordered by said captain of the "Ocklahama," in building the bulkhead before mentioned and when said barge listed and started to turn over, and as the same was sinking your respondent undertook to escape from the hold of said barge and was greatly injured by the falling of said wheat, the cargo upon said barge, and was thrown about and bruised and injured and suffered great bodily pain and his right arm was broken just above the elbow and the muscles detached from the bones in such a manner as to leave his said right arm weak, sore and disabled and that he is informed and therefore believes that his said right arm will never become strong and well and that its usefulness to assist him in making a livelihood is at an end, and it was by the labor of his arm that he gained his living. Admits that William Boyce, your respondent, now claims to have been thrown down and injured as a result of the listing of said barge. Denies that said accident happened or the losses, damage, injury and destruction above set forth were occasioned, done or occurred without the fault, privity or knowl-
50 edge of the petitioners and libellants herein, The Oregon Railway & Navigation Co. and The Oregon Short Line & Utah Northern Railway Co., or either of them, but your respondent on the contrary alleges *that* the facts to be that the unseaworthyness and the old and rotten condition of said barge and the negligence in overloading the same were each and all of them the causes of said loss, damage and injury or destruction, and were each and all of them with the full privity and knowledge of the libellants and petitioners above named and each of them. Denies that the said loss, damage, injury or destruction as described in said libel and petition or any loss, damage, injury or destruction in this behalf were due solely or at all to the perils of the sea. Your respondent, William Boyce, admits that on or about the 15th day of November, 1892, he commenced an action against the libellants and petitioners herein to recover damages in the sum of $15,000 for his injuries so received as alleged.

Fifth. Denies that none of the men on board the said barge "Columbia" were officers, agents or employees of the Oregon Railway & Navigation Co. Denies that the said barge "Columbia" was in all respects or in any respect sound, staunch or seaworthy. Denies that the injury to said wheat or to your respondent did not occur by reason of any negligence on the part of either of these petitioners and libellants herein or either of them or of their agents or servants. Denies that said loss and injury as above alleged was

caused solely or at all by a peril over which your petitioners or either of them had no control, or that the injury could not
51 have been prevented by the exercise of any care on the part of the petitioners and libellants or either of them, their officers or agents or employees, but your respondent alleges the facts to be that all of said loss or injury or damage to your respondent William Boyce did occur by reason of the fault and negligence of said petitioners and libellants herein and both of them, and that by the exercise of reasonable diligence and care upon the part of said petitioners and libellants and both of them it would never have occurred, and was caused wholly and solely by the want of care upon the part of your petitioners and libellants herein and both of them. Denies that your respondent William Boyce well knew the danger connected with working in the hold of said barge, or that said danger was one or any of the risks of his employment. Denies that the same was assumed voluntarily or that your respondent had a full or any knowledge of the danger connected therewith, but alleges *that* the facts to be that your respondent was employed as deck hand upon the said steamboat "Ocklahama," and was under the command and subject to the control of Marshal Short, its captain; that he was ordered as aforesaid to go to and upon said barge "Columbia" by said Marshal Short, captain, and assist in building the bulkhead; that he did not know the danger connected with working in the hold of said barge that as deck hand upon the steamboat "Ocklahama," the risks and dangers incident to his employment were only those ordinarily connected with the handling of said steamboat. Denies that the injuries resulting to the
52 said William Boyce, your respondent, and to the estate of Marshal Short and Gus Peterson, were not caused by any negligence or lack or care or skill on the part of the petitioners or any of their officers, agents, or employees, or were the results solely of the contributory negligence of the said Marshal Short, William Boyce and Gus Peterson, or either of them, in entering or remaining in the hold of the said barge, well knowing the danger connected with the working therein. Alleges the truth to be that the injuries resulting to the said William Boyce were solely and entirely caused by the negligence and carelessness of your petitioners and libellants herein The Oregon Railway & Navigation Co. and The Oregon Short Line & Utah Northern Railway Co. and both of them, their officers and agents in carelessly and negligently overloading the said barge "Columbia," far beyond her carrying capacity and in running and operating the said barge "Columbia" as a sound, staunch and seaworthy barge or lighter with a full knowledge that said barge was old, rotten, leaky and unseaworthy and totally unfit for use.

Wherefore, your respondent prays that the order heretofore made herein, directing that an appraisement of the value of the said barge "Columbia," be made and that monition issue against all persons claiming damages for said loss, destruction or injury occasioned as aforesaid be vacated and set aside; and that respondent be decreed to recover from the said libellants and petitioners the full amount

of his damages in this behalf sustained, together with the
53 costs and disbursements herein and for such other, further and different relief as to this honorable court may seem meet.

CHAS. F. LORD,
*Attorney for Respondent.*

STATE OF OREGON, }
*Multnomah County,* } ss:

I, William Boyce, being first duly sworn depose and say that I am the respondent named in the foregoing answer and that I have read the same and that all the facts are true as alleged herein to the best of my knowledge and belief.

WILLIAM BOYCE.

Subscribed and sworn to before me this 28th day of December, A. D. 1892.

[SEAL.]

CHAS. F. LORD,
*Notary Public for Oregon.*

STATE OF OREGON, }
*Multnomah County,* } ss:

Due service of the within answer is hereby accepted in Multnomah county, Oregon, this 29th day of December, 1892, by receiving a copy thereof duly certified to as such by Chas. F. Lord, proctor for respondent.

SNOW & McCAMANT,
*Proctors for Oregon Railway and Navigation Co.*
SNOW & McCAMANT,
*Proctors for Oregon Short Line & Utah N. R'y Co.*

(Endorsed:) Filed Dec. 29, 1892. R. B. Lamson, clerk.

And afterwards, to wit, on the 29th day of December, 1892, there was duly filed in said court a stipulation in words and figures as follows, to wit:

54 In the District Court of the United States for the District of Oregon.

In the Matter of the Petition of the Oregon Railway and Navigation Company as the Owner of the Barge "Columbia" and the Oregon Short Line and Utah Northern Railway Company as the Lessee Thereof.

It is hereby stipulated and agreed in the above-entitled proceeding, by and between W. W. Cotton, attorney for the petitioners, and J. F. & E. B. Watson, attorneys for Melvina Short, administratrix of the estate of Marshal B. Short, deceased, Anna Peterson, mother of John August Peterson, deceased, and Sven Anderson, administrator of the estate of John August Peterson, deceased:

That the time for each and all the persons above named to present *his* claim- to Paul R. Deady, commissioner of the United States cir-

cuit court, the person designated as the commissioner before whom such claims shall be made, in pursuance of the monition heretofore issued in the above-entitled proceeding and also the time for each and all of said persons to make proof of his or her claims in said proceeding shall be extended until the first day of February, 1893, and that within said time as hereby extended, each or any of said persons may answer the libel and petition herein and contest the right of petitioner- or either of them, either to limitation of
55 liability or exemption from liability, or both of said reliefs as prayed for in said petition.

Dated this 26th day of December, 1892.

W. W. COTTON,
*Attorney for Petitioners.*
J. F. & E. B. WATSON,
*Attorneys for Above-named Melvina Short, Anna Peterson, and Sven Anderson.*

(Endorsed:) Filed Dec. 29, 1892. R. B. Lamson, clerk.

And afterwards, to wit, on the 18th day of January, 1893, there was duly filed in said court a stipulation in words and figures as follows, to wit:

In the District Court of the United States for the District of Oregon.
In Admiralty.

The Barge Columbia; The Oregon Railway & Navigation Company and The Oregon Short Line & Utah Northern Railway Company, Libellants and Petitioners.

It is hereby stipulated by and between the proctor for the Oregon Railway & Navigation Company and the Oregon Short Line & Utah Northern Railway Company and the proctor for William Boyce, that the said Oregon Railway & Navigation Company and the said Oregon Short Line & Utah Northern Railway Company and each of them shall have to and including the first day of
56 February, 1893, in which to file exceptions to the answer filed by the said William Boyce, or any part thereof, for any ground or cause whatsoever, and shall have until the first day of February, 1893, in which, if desirable, to amend the libel and petition filed by the said Oregon Railway & Navigation Company and the Oregon Short Line & Utah Northern Railway Company.

W. W. COTTON,
*Proctor for the Libellants and Petitioners.*
CHAS. F. LORD,
*Proctor for William Boyce.*

(Endorsed:) Filed Jan. 18, 1893. R. B. Lamson, clerk.

And afterwards, to wit, on the 30th day of January, 1893, there was duly filed in said court, answers of Malvina Short, adm'r'x,

Sven Anderson, adm'r, and Anna C. Larson, in words and figures as follows, to wit:

In the District Court of the United States for the District of Oregon.

In the Matter of the Petition of the Oregon Railway & Navigation Company as the Owner of the Barge Columbia and the Oregon Short Line & Utah Northern Railway Company as the Lessee Thereof.

*Answer of Melvina Short, Administratrix of the Estate of Marshal B. Short, Deceased.*

57 The respondent Melvina Short, administratrix of the estate of Marshal B. Short, deceased, for her separate answer to the libel:

Admits that the first article in said libel is true.

Admits that the second article in said libel is true.

Admits that on the 21st day of October, 1892, the said barge Columbia left Portland, Oregon, having on board a cargo of wheat to be transported by the said barge from Portland, Oregon, to Astoria, Oregon, and that said wheat was part of the cargo of the British ship "Westgate," and destined to be transported by means of said ship and barge from Portland, Oregon, to Liverpool, England.

Denies that said barge was seaworthy or in good order or condition, or that said cargo of wheat was properly loaded thereon.

Denies that all went well with said barge until it reached Astoria on the night of the 21st of October, 1892, at the point where said barge intended to tie up alongside the dock of the Oregon Railway & Navigation Company.

Denies that she has any knowledge or information sufficient to form a belief whether there was lying in front of said dock and floating nearly level with the water, or otherwise, a float or pontoon, constructed of *of* the material and in the manner described in the libel, or otherwise, or whether said pontoon was fastened alongside or in front of said dock, or had recently been used for any purpose.

Admits that the night was dark, but denies that she has any knowledge or information of the night rendered it impossible
58 for the pilot and captain in charge of the "Ocklahama," the steamboat towing said barge, to see the pontoon; or whether in attempting to make a landing at the said dock, the said barge ran against such pontoon, or ran against the same with sufficient force to break the stem and forefoot of said barge, or either of them, or to start her timbers to such an extent that the said barge commenced leaking, or otherwise.

Denies that she has any knowledge or information sufficient to form a belief whether the persons in charge of said barge deemed it necessary and advisable to remove the said barge into more shallow water in order that the said barge and her cargo might be more conveniently saved, or whether thereupon the said barge was taken

behind the said dock and placed alongside the rear portion of said dock.

Denies that she has any knowledge or information sufficient to form a belief whether after an examination had been made by the men in charge of the said barge it was found that the barge would probably float if the pumps were used, or whether the men in charge of the said barge or any of them thereupon or otherwise commenced using the pumps or kept the leak under control so that the barge did not continue to take water faster than it was pumped out of her.

Admits that the cargo on said barge was entirely loaded on her deck, and that such is the customary and proper manner in vessels of her character, but denies that she has any knowledge or information sufficient to form a belief whether at the time the said pumps were working no part of said cargo was injured or whether
59 said pumps or any of them were working or capable of being worked at any time after said barge reached said dock.

Admits that the men in charge of the said barge undertook to stop the leak in the barge by building a bulkhead, intending to place between said bulkhead and the bow of the barge sacks of wheat for the purpose of stopping the leak in the bow of the said barge.

Admits that in order to aid the work in the building of the said bulkhead three men among others entered the hold to the said barge, and that said three men were Marshal B. Short, the captain of the "Ocklahama," William Boyce and John August Peterson, deck hands on said steamer "Ocklahama."

Denies that she has any knowledge or information sufficient to form a belief whether at this time the tide was ebbing or whether while the men were in the hold of the said barge the same touched ground.

Denies that she has any knowledge or information sufficient to form a belief whether an examination was thereupon made by the men in charge of the said barge as to her condition or position, or whether said men thereupon or at any time thereafter concluded to undertake to continue work to stop the said leak, believing that the said barge would sink into the mud and remain upright or otherwise.

Denies that she has any knowledge or information sufficient to form a belief whether the said barge suddenly listed as the tide continued to fall, but admits that it suddenly listed away from said dock and partially turned over.

Admits that as said Marshal B. Short undertook to escape
60 from the hold of the said barge he was caught by the falling cargo of the said barge, which consisted of sacks of wheat piled in tiers upon the deck of said barge and was thereby crushed and killed.

Admits that a large amount of the said cargo was thrown into the water, and that the barge was subjected to such a severe strain that her house was carried away and her hull damaged.

Denies that the said accident happened, or the losses, damage, injury or destruction to said Marshal B. Short and his estate, set

forth in the libel, or any of them were occasioned or done or occurred without the fault, privity and knowledge of the libellants, and each of them.

Denies that said losses, damage, injury and destruction, or any of them, were due solely, or at all, to the perils, or any peril of the sea.

Denies that the said barge Columbia was in all respects sound, seaworthy, staunch or properly manned, equipped or provided for the voyage in which she was engaged, or was under the charge of suitable or proper officers.

Denies that the injury to the wheat did not occur by reason of the negligence on the part of the libellants, or some of them, or that it was caused solely or at all, by a peril over which libellants, nor any of them had any control, or that said injury could not have been prevented by the exercise of proper care on the part of libellants.

Denies that the said Marshal P. Short, William Boyce, and John August Peterson, or any of them, well, or at all, knew the danger connected with the working in the hold of the said barge.

61 Denies that the said danger was one of the risks of their, or of any of their, respective employments, and denies that said danger was voluntarily assumed by them, or any of them, or that they or any of them had full or any knowledge of said danger, as connected with said employment, or otherwise.

Denies that the injuries resulting to the said William Boyce, and to the estates of the said Marshal B. Short and John August Peterson, or any of them, were not caused by any negligence or lack of care or skill on the part of libellants, or some of them, and denies that the said injuries or any of them were the results solely, or at all, of the contributory negligence of the said Marshal B. Short, William Boyce and John August Peterson, or any of them, in entering, or remaining in the hold of the said barge, well knowing the danger connected with the working therein, or otherwise.

And further answering the libel and petition herein, the respondent, Melvina Short, administratrix of the estate of Marshal B. Short, deceased, avers the following facts:

I. That at all the times in this answer mentioned the libellant, Oregon Short Line & Utah Northern Railway Company, was and now is a corporation, duly incorporated and organized and existing under the laws of the Territories of Wyoming and Utah for the purpose of transporting passengers and freight, as a common carrier, for hire, and carrying on said business in the State of Oregon under permission of the laws thereof.

II. That for a long time prior to and on the 22d day of

62 October, 1892, said libellant, carelessly and negligently, had in its possession and employment, and used in transporting freight on the Willamette river and Columbia river, from its docks at Portland, to its docks at Astoria, Oregon, a certain barge named "Columbia," which was improperly constructed, insufficient and unsafe for said purpose, in that it had a round instead of a flat bottom, and was old, worn, unsound, decayed and leaky, utterly

unseaworthy, and without suitable pumps and pumping apparatus, and said libellant well knew the same.

III. That said libellant with said knowledge, did on October 19th, 1892, carelessly and negligently load said barge, at its dock at Portland, Oregon, in an unskillful and unsafe manner, with sacks of wheat by piling the same loosely and insecurely at a great height, on the central portion of the deck of said barge and around the hatchways in said deck, and to the amount of about six hundred (600) tons, which was far beyond the capacity of said barge to carry or sustain in safety in its then condition: and did carelessly and negligently permit said barge so overloaded to remain at its said dock from said October 19th, 1892, until the afternoon of October 21st, 1892, and thereby to accumulate a large quantity of water in the hold thereof through leaks in the bottom and sides thereof.

IV. That on October 21st and 22d, 1892, said Marshal B. Short was in said libellant's employment as captain of its steamboat "Ocklahama," on the Willamette and Columbia rivers aforesaid.

V. That on the afternoon of October 21st, 1892, said Mar-
63 shal B. Short under and in pursuance of the orders and instructions of the said libellant, took said barge so improperly constructed, insufficient, unsafe, unseaworthy, and unprovided with suitable pumps and pumping apparatus, and unskillfully, carelessly and negligently overloaded and leaky as aforesaid, under his charge and control, and towed the same with said steamboat "Ocklahama," from libellant's dock at Portland, Oregon, to one of its docks at Astoria, Oregon.

VI. That on October 22d, 1892, at said dock of said libellant, at Astoria, Oregon, while said barge was still attached to said steamboat "Ocklahama," and in tow thereof, and in the charge and under the control of the said Marshal B. Short, as aforesaid, and while said Marshal B. Short was lawfully on board of said barge and in the performance of his duties under his employment aforesaid, and without any fault or want of due care or caution on his part, but solely through the unsound and unsafe condition of said barge, and said overloading, together with said water in the hold thereof, and said unskillful, loose, and insecure piling of said sacks of wheat as aforesaid, all owing to the carelessness and negligence of libellant as aforesaid, said barge suddenly turned to one side, or broke or gave way whereby said load of wheat was shifted towards said side and a large number of said sacks of wheat fell upon and crushed and smothered said Marshal B. Short, in consequence whereof he then and there died.

VII. That said Marshal B. Short was at the time of his death of
the age of twenty-six years, and was strong, healthy and
64 active, industrious and economical in his habits, competent and skillful as a captain of steamboats, and was earning one hundred and twenty-five ($125.00) dollars per month.

VIII. That said Marshal B. Short died intestate leaving this respondent his surviving widow, his sole heir-at-law, who on November 7th, 1892, was duly appointed administratrix of his estate by the county court of Multnomah county, State of Oregon, by an order

that day made and entered in its journal; and thereupon duly qualified and entered upon the performance of her duties and ever since has been and now is the legal and acting administratrix of said estate.

IX. That by reason of the premises the said respondent as such administratrix has been damaged in the full sum of five thousand ($5,000.00) dollars.

Wherefore said respondent prays that order and monition heretofore made herein be vacated and set aside, and for a judgment against said libellants for the sum of five thousand dollars damages together with her costs and disbursements in this suit.

WATSON, BEEKMAN & WATSON,
*Attorneys for said Respondent, Melvina Short.*

STATE OF OREGON,
*County of Multnomah,* } ss:

I, Melvina Short, being first duly sworn, depose and say that I am a respondent in the above-entitled suit and that the foregoing answer is true as I verily believe.

MELVINA SHORT.

65 Subscribed and sworn to before me this 30th day of January, 1893.

[SEAL.]

GEO. W. P. JOSEPH,
*Notary Public for the State of Oregon.*

UNITED STATES OF AMERICA,
*District of Oregon,* } ss:

Due service of the within answer is hereby accepted in Multnomah county, Oregon, this — day of January, 1893, by receiving a copy thereof duly certified to as such by E. B. Watson of attorneys for respondent.

W. W. COTTON,
*Attorney for Libellants.*

(Endorsed:) Filed Jan. 30, 1893. R. B. Lamson, clerk.

In the District Court of the United States for the District of Oregon.

In the Matter of the Petition of the Oregon Railway & Navigation Company as the Owner of the Barge "Columbia" and the Oregon Short Line & Utah Northern Railway Company as the Lessee Thereof.

*Answer of Sven Anderson, Administrator of the Estate of John August Peterson, Deceased.*

66 The respondent Sven Anderson, administrator of the estate of John August Peterson, deceased, for his separate answer to the libel:

Admits that the first article in said libel is true.

Admits that the second article in said libel is true.

Admits that on the 21st day of October, 1892, the said barge "Columbia" left Portland, Oregon, having on board a cargo of wheat to be transported by the said barge from Portland, Oregon, to Astoria, Oregon, and that said wheat was part of the cargo of the British ship "Westgate," and destined to be transported by means of said ship and barge from Portland, Oregon, to Liverpool, England.

Denies that said barge was seaworthy or in good order or condition, or that said cargo of wheat was properly loaded thereon.

Denies that all went well with said barge until it reached Astoria on the night of the 21st of October, 1892, at the point where said barge intended to tie up alongside of the dock of the Oregon Railway & Navigation Company.

Denies that he has any knowledge or information sufficient to form a belief whether there was lying in front of said dock and floating nearly level with the water or otherwise a float or pontoon constructed of the material and in the manner described in the libel or otherwise or whether said pontoon was fastened alongside or in front of said dock or had recently been used for any purpose.

Admits that the night was dark, but denies that he has any knowledge or information sufficient to form a belief whether the darkness of the night rendered it impossible for the pilot and
67 captain in charge of the "Ocklahama," the steamboat towing said barge, to see the pontoon; or whether in attempting to make a landing at the said dock, the said barge ran against such pontoon, or ran against the same with sufficient force to break the stem and forefoot of said barge, or either of them, or to start her timbers to such an extent that the said barge commenced leaking, or otherwise.

Denies that he has any knowledge or information sufficient to form a belief whether the persons in charge of said barge deemed it necessary or advisable to remove the said barge into more shallow water in order that the said barge and her cargo might be more conveniently saved, or whether thereupon the said barge was taken behind the said dock and placed alonside the rear portion of said dock.

Denies that he has any knowledge or information sufficient to form a belief whether after an examination had been made by the men in charge of the said barge, it was found that the barge would probably float if the pumps were used, or whether the men in charge of the said barge or any of them, thereupon or otherwise commenced using the pumps, or kept the leak under control so that the barge did not continue to take water faster than it was pumped out of her.

Admits that the cargo on said barge was entirely loaded on her deck, and that such is the customary and proper manner in vessels of her character, but denies that he has any knowledge or information sufficient to form a belief whether at the time the said pumps were working, no part of the said cargo was injured, or
68 whether said pumps or any of them were working, or capable of being worked, at any time after said barge reached said dock.

Admits that the men in charge of the said barge undertook to stop the leak in the barge by building a bulkhead, intending to place between said bulkhead and the bow of the barge, sacks of wheat for the purpose of stopping the leak in the bow of the said barge.

Admits that in order to aid the work in the building of the said bulkhead, three men, among others, entered the hold to the said barge, and that said three men were Marshal B. Short, the captain of the "Ocklahama;" William Boyce and John August Peterson, deck hands on said steamer "Ocklahama."

Denies that he has any knowledge or information sufficient to form a belief whether at this time the tide was ebbing, or whether while the men were in the hold of the said barge the same touched ground.

Denies that he has any knowledge or information sufficient to form a belief whether an examination was thereupon made by the men in charge of the said barge as to her condition or position, or whether said men thereupon or at any time thereafter, concluded to undertake to continue work to stop the said leak, believing that the said barge would sink into the mud and remain upright, or otherwise.

Denies that he has any knowledge or information sufficient to form a belief whether the said barge suddenly listed as the tide continued to fall, but admits that it suddenly listed away from said dock, and partially turned over.

69 Denies that as said John August Peterson undertook to escape from the hold of the said barge he was caught by the falling cargo of the said barge, which consisted of sacks of wheat piled in tiers upon the deck of said barge and was thereby crushed and killed.

Admits that a large amount of the said cargo was thrown into the water, and that the barge was subjected to such a severe strain that her house was carried away and her hull damaged.

Denies that the said accident happened or the losses, damage, injury or destruction to said John August Peterson and his estate, set forth in the libel or any of them were occasioned or done or occurred without the fault, privity and knowledge of the libellants and each of them.

Denies that said losses, damage, injury and destruction or any of them were due solely or at all to the perils or any peril of the sea.

Denies that the said barge "Columbia" was in all respects sound, seaworthy, staunch or properly manned, equipped or provided for the voyage in which she was engaged, or was under the charge of suitable or proper officers.

Denies that the injury to the wheat did not occur by reason of any negligence on the part of the libellants or some of them or that it was caused solely or at all by a peril over which libellants nor any of them had any control, or that said injury could not have been prevented by the exercise of proper care on the part of libellants.

Denies that the said Marshal B. Short, William Boyce and John

August Peterson or any of them well or at all knew the danger connected with the working in the hold of the said barge.

70 Denies that said danger was one of the risks of their or any of their respective employments and denies that said danger was voluntarily assumed by them or any of them, or that they or any of them had full or any knowledge of said danger as connected with said employment or otherwise.

Denies that the injuries resulting to the said William Boyce and to the estates of the said Marshal B. Short and John August Peterson or any of them were not caused by any negligence or lack of care or skill on the part of libellants or some of them, and denies that the said injuries were the results solely or at all of the contributory negligence of the said Marshal B. Short, William Boyce and John August Peterson or any of them in entering or remaining in the hold of said barge, well knowing the danger connected with the working therein or otherwise.

And further answering the libel and petition herein the respondent Sven Anderson, administrator of the estate of John August Peterson, deceased, avers the following facts:

I. That at all the times in this answer mentioned the libellant, Oregon Short Line & Utah Northern Railway Company, was and now is a corporation duly incorporated and organized under the laws of the Territories of Wyoming and Utah for the purpose of transporting passengers and freight as a common carrier for hire, and carrying on said business in the State of Oregon under permission of the laws thereof.

II. That for a long time prior to and on October 22d, 1892, said libellant carelessly and negligently had in its possession and employment, and used in transporting freight on the Willamette

71 and Columbia rivers, from its docks at Portland, Oregon, to its docks at Astoria, Oregon, a certain barge named "Columbia," which was improperly constructed, insufficient and unsafe, for said purpose, in that it had a round instead of a flat bottom, and was old, worn, unsound, decayed and utterly unseaworthy, and leaky and without suitable pumps and pumping apparatus, and libellant well knew the same.

III. That said libellant with said knowledge did on October 19th, 1892, carelessly and negligently load said barge at its dock at Portland, Oregon, in an unskillful and unsafe manner, with sacks of wheat, by piling the same loosely and insecurely to a great height on the central portion of the deck of said barge, and around the hatchways in said deck, and to the amount of about six hundred tons, which was far beyond the capacity of said barge to carry or sustain with safety in its then condition; and did carelessly and negligently permit said barge so overloaded to remain at its said dock from said October 19th, 1892, until the afternoon of October 21st, 1892, and thereby to accumulate a large quantity of water in its hold through leaks in the bottom and sides thereof.

IV. That on October 21st and 22d, 1892, John August Peterson was in said libellant's employment as a deck hand on its said steamboat "Ocklahama," on the Willamette and Columbia rivers, and

under the authority and subject to the orders and directions of the captain thereof.

V. That during the same time Marshall B. Short was in the employment of the said libellant as captain of said steamboat.

72 VI. That on the afternoon of October 21st, 1892, said Marshal B. Short under and in pursuance of the orders and instructions of the said libellant, took said barge so improperly constructed, insufficient, unsafe and unskillfully, carelessly and negligently overloaded, and leaky as aforesaid, under his charge and control, and towed the same with said steamboat "Ocklahama," having said John August Peterson on board as a deck hand as aforesaid, from said libellant's dock at Portland, Oregon, to one of its docks at Astoria, Oregon.

VII. That on October 22d, 1892, at said dock of said libellant at Astoria, Oregon, while said barge was still attached to said steamboat "Ocklahama," and in tow thereof, and in the charge and under the control of the said Marshal B. Short, captain as aforesaid, said John August Peterson, under the authority and in obedience to the order of said Marshal B. Short, as such captain, in charge and control of said barge as aforesaid, lawfully went from the deck of said steamboat on board of the said barge and into the hold thereof, to assist in repairing a leak therein, and while in said hold and so engaged, under the authority and in obedience to the orders and directions of said Marshal B. Short as such captain, in charge and control as aforesaid, and without any fault or want of due care or caution on his part, but solely through the unsound and unsafe condition of said barge and said overloading, together with the water in the hold thereof, and said unskillful, loose and insecure piling of said sacks of wheat, as aforesaid, all owing to the

73 carelessness of said libellant as aforesaid, said barge suddenly turned to one side or broke and gave way, thereby causing said load of wheat to move or shift, whereby a large quantity of water was shipped into said hold, said deck broken in and said hatchways filled with fallen sacks of wheat, so that said John August Peterson was confined in said hold, and drowned by said water, from the effects of which he then and there died.

VIII. That said John August Peterson was at the time of his death a minor, of the age of twenty years and eight months, but for more than three years prior thereto had been, and then was, fully emancipated and released from all parental authority and claim of service by his only surviving parent, Anna C. Larson, and earning and receiving wages at the rate of forty dollars per month, on his own account, and investing the surplus thereof for his own benefit; and was healthy, strong and active in body, sober, industrious and economical in his habits, competent and skillful as a deck hand on steamboats, and capable of accumulating and managing property, and had then acquired through his own earnings over six hundred dollars' worth of property, both real and personal, and would if he had lived, have accumulated a large estate of greater present value than five thousand dollars.

IX. That said John August Peterson died intestate, but leaving

an estate consisting of both real and personal property in Multnomah county, Oregon, and on November 3d, 1892, this respondent was duly appointed administrator of his estate by the county court of Multnomah county, Oregon, by an order that day made
74 and entered in its journal; and thereupon duly qualified and entered upon the performance of his duties, and ever since has been and now is the legal and acting administrator of said estate.

X. That by reason of the premises the respondent as such administrator, has been damaged in the full sum of five thousand dollars.

Wherefore respondent prays that the order and monition herein be vacated and set aside, and for a judgment against the said libellant for the sum of five thousand dollars damages, together with his costs and disbursements in this action.

WATSON, BEEKMAN & WATSON,
*Attorneys for Respondent Sven Anderson.*

STATE OF OREGON, }
*County of Multnomah,* } ss:

I, Sven Anderson, being first duly sworn, depose and say that I am the respondent in the above-entitled suit, and that the foregoing is true as I verily believe.

SVEN ANDERSON.

Subscribed and sworn to before me this 27th day of January, 1893.

[SEAL.]

GEO. W. P. JOSEPH,
*Notary Public for the State of Oregon.*

UNITED STATES OF AMERICA, }
*State of Oregon, County of Multnomah,* } ss:

Due service of the within answer is hereby accepted in Multnomah county, Oregon, this — day of January, 1893, by
75 receiving a copy thereof, duly certified to as such by E. B. Watson, of attorneys for respondent.

W. W. COTTON,
*Attorney for Libellants.*

(Endorsed): Filed Jan. 30, 1893. R. B. Lamson, clerk.

In the District Court of the United States for the District of Oregon.

In the Matter of the Petition of the Oregon Railway & Navigation Company as the Owner of the Barge "Columbia" and the Oregon Short Line & Utah Northern Railway Company as Lessee Thereof.

*Answer of Anna C. Larson, Mother of John August Peterson, Deceased.*

The respondent Anna C. Larson, mother of said John August Peterson, deceased, for her separate answer to the libel:

Admits that the first article in said libel is true.

Admits that the second article in said libel is true.

Admits that on the 21st day of October, 1892, the said barge "Columbia" left Portland, Oregon, having on board a cargo of wheat to be transported by the said barge from Portland, Oregon, to Astoria, Oregon, and that said wheat was part of the cargo of the British ship "Westgate," and destined to be transported by means of said ship and barge from Portland, Oregon, to Liverpool, England.

76 Denies that said barge was seaworthy or in good order or condition or that said cargo of wheat was properly loaded thereon.

Denies that all went well with said barge until it reached Astoria on the night of the 21st of October, 1892, at the point where said barge intended to tie up alongside of the dock of the Oregon Railway & Navigation Company.

Denies that she has any knowledge or information sufficient to form a belief whether there was lying in front of said dock and floating nearly level with the water or otherwise a float or pontoon constructed of the material and in the manner described in the libel or otherwise, or whether said pontoon was fastened alongside or in front of said dock or had recently been used for any purpose.

Admits that the night was dark, but denies that she has any knowledge or information sufficient to form a belief whether the darkness of the night rendered it impossible for the pilot and captain in charge of the "Ocklahama," the steamboat towing said barge, to see the pontoon, or whether in attempting to make a landing at the said dock the said barge ran against such pontoon or ran against the same with sufficient force to break the stem and forefoot of said barge or either of them or to start her timbers to such an extent that the said barge commenced leaking or otherwise.

Denies that she has any knowledge or information sufficient to form a belief whether the persons in charge of said barge deemed it necessary and advisable to remove the said barge into more

77 shallow water in order that the said barge and her cargo might be more conveniently saved or whether thereupon the said barge was taken behind the said dock and placed alongside the rear portion of the said dock.

Denies that she has any knowledge or information sufficient to form a belief whether after an examination had been made by the

men in charge of the said barge, it was found that the barge would probably float if the pumps were used, or whether the men in charge of the said barge or any of them, thereupon or otherwise commenced using the pumps, or kept the leak under control so that the barge did not continue to take water faster than it was pumped out of her.

Admits that the cargo on said barge was entirely loaded on her deck, and that such is the customary and proper manner in vessels of her character, but denies that she has any knowledge or information sufficient to form a belief whether at the time said pumps were working, no part of said cargo was injured, or whether said pumps or any of them were working, or capable of being worked, at any time after said barge reached said dock.

Admits that the men in charge of the said barge undertook to stop the leak in the barge by building a bulkhead, intending to place between said bulkhead and the bow of the barge sacks of wheat for the purpose of stopping the leak in the bow of the said barge.

Admits that in order to aid the work in the building of the said bulkhead, three men, among others, entered the hold to the said barge, and that said three men were Marshal B. Short, the
78 captain of the "Ocklahama," William Boyce and John August Peterson, deck hands on said steamer "Ocklahama."

Denies that she has any knowledge or information sufficient to form a belief whether at this time the tide was ebbing, or whether while the men were in the hold of the said barge the same touched ground.

Denies that she has any knowledge or information sufficient to form a belief whether an examination was thereupon made by the men in charge of the said barge as to her condition or position, or whether said men thereupon or at any time thereafter, concluded to undertake to continue work to stop the said leak, believing that the said barge would sink into the mud and remain upright, or otherwise.

Denies that she has any knowledge or information sufficient to form a belief whether the said barge suddenly listed as the tide continued to fall, but admits that it suddenly listed away from said dock, and partially turned over.

Denies that as said John August Peterson undertook to escape from the hold of the said barge, he was caught by the falling cargo of the said barge, which consisted of sacks of wheat piled in tiers upon the deck of said barge, and was thereby crushed and killed.

Admits that a large amount of the said cargo was thrown into the water, and that the barge was subjected to such a severe strain that her house was carried away and her hull damaged.

Denies that the said accident happened, or the losses, damage, injury or destruction to said John August Peterson and his
79 estate, set forth in the libel, or any of them were occasioned or done, or occurred without the fault, privity and knowledge of the libellants, and each of them.

Denies that said losses, damage, injury and destruction, or any of them, were due solely, or at all, to the perils or any peril of the sea.

Denies that the said barge "Columbia" was in all respects sound, seaworthy, staunch or properly manned, equipped or provided for the voyage in which she was engaged, or was under the charge of suitable or proper officers.

Denies that the injury to the wheat did not occur by reason of any negligence on the part of the libellants or some of them, or that it was caused solely or at all by a peril over which libellants nor any of them had any control, or that said injury could not have been prevented by the exercise of proper care on the part of libellants.

Denies that the said Marshal B. Short, William Boyce and John August Peterson or either of them well or at all knew the danger connected with the working in the hold of the said barge.

Denies that said danger was one of the risks of their or any of their respective employments, and denies that said danger was voluntarily assumed by them or any of them or that they or either of them had full or any knowledge of said danger as connected with said employment or otherwise.

Denies that the injuries resulting to the said William Boyce and to the estates of the said Marshal B. Short and John August Peterson or any of them were not caused by any negligence or lack
80 of care or skill on the part of libellants or some of them, and denies that the said injuries were the results solely or at all of the contributory negligence of the said Marshal B. Short, William Boyce and John August Peterson or any of them in entering or remaining in the hold of said barge well knowing the danger connected with the working therein or otherwise.

The respondent, Anna C. Larson, as the mother and sole surviving parent of John August Peterson, deceased, referred to in the libel as Gus Patterson, further answering the libel therein, alleges:

That at all the times in this answer mentioned the libellant, Oregon Short Line & Utah Northern Railroad Company, was and now is a corporation duly incorporated and organized under the laws of the Territories of Wyoming and Utah for the purpose of transporting passengers and freight as a common carrier for hire and carrying on said business in the State of Oregon under permission of the laws thereof.

II. That for a long time prior to and on October 22d, 1892, said libellant carelessly and negligently had in its possession and employment and used in transporting freight on the Willamette and Columbia rivers from its docks at Portland, Oregon, to its docks at Astoria, Oregon, a certain barge named "Columbia," which was improperly constructed, insufficient and unsafe for said purpose in that it had a round instead of a flat bottom and was old, worn, unsound, decayed and utterly unseaworthy and leaky, and without suitable pumps and pumping apparatus, and that libellant well knew the same.

III. That said libellant did with said knowledge on October
81 19th, 1892, carelessly and negligently load said barge in an unskillful and unsafe manner at its dock at Portland, Oregon, with sacks of wheat, by piling the same loosely and insecurely

to a great height on the central portion of the deck of said barge and around the hatchways in said deck, and to the amount of about six hundred tons, which was far beyond the capacity of said barge to carry or sustain with safety in its then condition, and did carelessly and negligently permit said barge so overloaded to remain at its said dock from said October 19th, 1892, until the afternoon of October 21st, 1892, and thereby to accumulate a large quantity of water in its hold through leaks in the bottom and sides thereof.

IV. That on October 21st and 22d, 1892, said John August Peterson was in said libellant's employment as a deck hand on its said steamboat "Ocklahama," on the Willamette and Columbia rivers, and under the authority and subject to the orders and directions of the captain thereof.

V. That during the same time said Marshal B. Short was in the employment of the said libellant as captain of said steamboat.

VI. That on the afternoon of October 21st, 1892, said Marshal B. Short, under and in pursuance of the orders and directions of the said libellant, took said barge so improperly constructed, insufficient, unsafe, and unskillfully, carelessly, and negligently overloaded, and leaky as aforesaid, under his charge and control, and towed the same with said steamboat "Ocklahama," having said John August Peterson on board as a deck hand, as aforesaid,
82 from said libellant's dock at Portland, Oregon, to one of its docks at Astoria, Oregon.

VII. That on October 22d, 1892, at said dock of said libellant, at Astoria, Oregon, while said barge was still attached to said steamboat "Ocklahama," and in tow thereof and in the charge and control of the said Marshal B. Short, captain as aforesaid, said John August Peterson, under the authority and in obedience to the order of said Marshal B. Short, as such captain, in charge and control of said barge, as aforesaid, lawfully went from the deck of said steamboat, on board of the said barge and into the hold thereof, to assist in repairing a leak therein, and while in said hold and so engaged, under the authority and in obedience to the orders and directions of said Marshal B. Short, as such captain, in charge and control as aforesaid, and without any fault or want of due care or caution on his part, but solely through the unsound and unsafe condition of said barge, and said overloading, together with the water in the hold thereof, and said unskillful, loose and insecure piling of said sacks of wheat, as aforesaid, all owing to the carelessness of said libellant as aforesaid, said barge suddenly turned to one side, or broke and gave way, thereby causing said load of wheat to move or shift, whereby a large quantity of water was shipped into said hold, said deck broken down, and said hatchways filled with fallen sacks of wheat, so that said John August Peterson was confined in said hold and drowned by said water, from the effects of which he then and there died.

VIII. That the respondent Anna C. Larson and Peter Larson were lawfully intermarried in the Kingdom of Sweden, in or
83 about the year 1870, and had five children as the issue of said marriage, of whom said John August Peterson was the

eldest, being twenty years and eight months old at the time of his death, as above set forth, and the youngest child being now about thirteen years of age.

That said Peter Larsen died in or about the year 1880, leaving all of said children in the care and custody of the respondent, and all of said children remained in her care and custody, and received their support from her, until in or about the year 1889, when said John August Peterson left the respondent's home in Sweden, and came to Portland in the State of Oregon, with the respondent's permission, for the purpose of obtaining employment, earning wages, and accumulating property, both on his own account and to enable him to contribute money to the support and maintenance of the respondent and said other children, who remained with the respondent, as they might be or become in need thereof.

IX. That said John August Peterson at the time of his death, was unmarried, strong, healthy, industrious, economical and a competent and skillful deck hand on steamboats, and earning and receiving wages in such employment at the rate of forty dollars per month together with his board and lodging, and would if he had lived have continued to work in said employment and receive the the same and even higher wages for his services.

X. That ever since his father's death, and up to the time he left home as aforesaid, said John August Peterson was accustomed
84 to and did render service to the respondent, and did materially aid and contribute to her support, and from and after reaching Portland, Oregon, in or about the year 1889, and up to the time of his death, contributed towards her support from his earnings, at the rate of ten dollars per month, or one hundred and twenty dollars per year.

XI. That respondent is fifty-six years old, and in feeble health, and still has the care and custody of said other children, with no means for her or their support and maintenance, except her own manual labor, and has been ever since the death of said John August Peterson, and now is, and will continue to be in great need of his said contributions towards her support, and has suffered and will continue to suffer great discomforts and pecuniary loss and injury by reason of being deprived of the same through his death.

XII. That said John August Peterson entertained a deep affection for the respondent, and a strong sense of his duty to support her up to the time of his death, and then and for a long time prior thereto, intended to and would if he had lived, have worked and received wages, and have contributed the same towards her support during her natural life, at the rate of not less than ten dollars per month, and even to a much larger amount per month, as her necessities might require, and respondent is now and for as long as she lives will continue to be in great need thereof for said purposes.

XIII. That by reason of the premises respondent has been damaged in the sum of six thousand dollars.

85 Wherefore the respondent prays that the order and monition herein be vacated and set aside, and that she may have judgment against the said libellant, The Oregon Short Line & Utah

Northern Railway Company, for the sum of six thousand dollars, as damages, and for her costs and disbursements in this suit.

WATSON, BEEKMAN & WATSON,
*Attorneys for Respondent Anna C. Larson.*

STATE OF OREGON, } ss:
*County of Multnomah,* }

I, E. B. Watson, being first duly sworn, depose and say that I am one of respondent's attorneys in the above-entitled suit, and that the foregoing answer is true as I verily believe. I make this affidavit because said respondent is not a resident of or within said State.

E. B. WATSON.

Subscribed and sworn to before me this 27th day of January, 1893.

[SEAL.]

GEO. W. P. JOSEPH,
*Notary Public for the State of Oregon.*

STATE OF OREGON, } ss:
*County of Multnomah,* }

Due service of the within answer is hereby accepted in Multnomah county, Oregon, this — day of January, 1893, by receiving a copy thereof, duly certified to as such by E. B. Watson, of attorneys for respondent.

W. W. COTTON,
*Attorney for Libellant.*

(Endorsed:) Filed Jan. 30, 1893. R. B. Lamson, clerk.

86 And afterwards, to wit, on the 10th day of February, 1893, there was duly filed in said court an amended answer of William Boyce in words and figures as follows, to wit:

In the District Court of the United States for the District of Oregon.
In Admiralty.

The Barge "Columbia;" The Oregon Railway & Navigation Company and The Oregon Short Line & Utah Northern Railway Company, Libellants and Petitioners.

To the Honorable Matthew P. Deady, judge of the district court of the United States for the district of Oregon:

William Boyce exhibits this, his amended answer to the libel and petition of the Oregon Railway & Navigation Co. and the Oregon Short Line & Utah Northern Railway Co., and answers and alleges as follows:

1st. Admits that article first of said libel and petition is true.

2d. Admits that article second of said libel and petition is true.

3d. Admits that on or about the 21st day of October, A. D. 1892, the barge or lighter "Columbia," referred to in said libel and

petition, left Portland, Oregon, having on board a cargo of wheat to be transported by said barge from Portland, Oregon to
87 Astoria, Oregon, said wheat being part of the cargo of the British ship "Westgate," destined to Liverpool, England; but denies that said wheat was to be transported in said barge "Columbia" farther than Astoria, Oregon. Your respondent alleges the fact to be that said barge "Columbia" was not a seagoing craft, but used as a barge and lighter, and entirely in the navigation of inland waters and rivers, and always has been so used. Denies that said barge "Columbia" was seaworthy or in good order or condition, or that said cargo of wheat was properly loaded thereon; on the contrary this respondent alleges the truth to be that said barge or lighter was very unseaworthy and was in bad order and condition at said time, and these facts were at said time well known to the owners of said barge, their lessees, their officers and agents, and that said cargo of wheat was carelessly, negligently and improperly loaded on said barge, and said barge at said time was very much overloaded and beyond its carrying capacity even had said barge been thoroughly sound, staunch and seaworthy; and your respondent denies that all went well with said barge until on the night of the 21st day of October, 1892, when it reached Astoria, Oregon; but on the contrary said barge, owing to its being overloaded with wheat beyond its carrying capacity, careened, rolled and pitched upon the entire voyage from Portland to Astoria, Oregon. As to whether or not said barge intended to tie up alongside the dock of the Oregon Railway & Navigation Co., this respondent has no knowledge sufficient to form a belief. Admits that a float or pontoon, sub-
88 stantially as alleged in said libel and petition, was lying in the water in front of said dock for the purpose of preventing ships from chafing against the timbers of said dock. Denies that by reason of the darkness of the night rendered it impossible for the pilot or captain in charge of the "Ocklahama," the steamboat towing said barge, to see said float or pontoon. Denies that said barge or lighter ran against said float or pontoon. But alleges the facts to be that said barge ran to and under the wharf or dock, and that the anchor was thrust through the side of said barge. Denies that said leakage was wholly caused by said collision or that said timbers started by reason of colliding with said float or pontoon or wharf or dock, or that the same was wholly caused by attempting to make a landing; but your respondent alleges the facts to be that said barge was so carelessly and negligently overloaded and so old and rotten and unseaworthy that the same was unseaworthy and unmanageable. Admits that said barge was taken into more shallow water by order of the persons in charge of said barge, — made examinations to ascertain its condition, or as to whether it was found it would probably float if pumps were used, your respondent has not sufficient knowledge to form a belief. Admits that said pumps were used. Admits that the cargo was entirely upon the deck of said barge. Admits that the men in charge of said barge undertook to stop the leaking in said barge by building a bulkhead with sacks of wheat around said leak, and alleges that at about 12 o'clock on the

night of the 21st day of October, A. D. 1892, Marshal Short, captain of the steamboat "Ocklahama," towing said barge, ordered
89 your respondent who was deck hand on the said steamboat the "Ocklahama," to go to and on board said barge and assist in building said bulkhead. Admits that in order to construct said bulkhead, it was necessary to go into the hold of said barge. Admits that said Marshal Short, Gus Peterson and your respondent went into the hold of said barge for the purpose of building said bulkhead. Admits that the tide was ebbing at the time the said bulkhead was being so constructed, but as to whether said barge touched the ground, your respondent has not sufficient knowledge to form a belief. Alleges that it was nothing unusual for such a barge as the "Columbia" to take the ground or to suddenly list when loaded beyond its carrying capacity, and that the strain to which said barge was thereby at that time subject was not severe or unusual and would not have injured said barge in any respect, had it been sound, staunch and seaworthy or had it not been so negligently loaded. As to whether an examination was therein made by the men in charge of said barge, as to her condition and position, or that such men thereupon concluded to continue with the work of undertaking to stop the said leak or that they believed that said barge would sink into mud and remain upright, your respondent has not sufficient knowledge to form a belief. Admits that said barge suddenly listed to one side and away from said dock and partially turned over and sank. Admits that said Marshal Short and Gus Peterson undertook to escape from the hold of said barge and that they were caught by the falling cargo of the said barge, to wit, wheat sacks, piled
89 in tiers upon the deck of said barge and were crushed and killed. Admits that a large amount of said cargo was thrown into the water and the said barge was subjected — such a severe strain that its house was carried away, and her hull injured, but alleges that any damage or injury said barge may have or did receive was caused wholly by the negligent loading of the same, and was wholly due to the rotten and imperfect condition of the said barge "Columbia," and not otherwise. And your respondent alleges the facts to be that while he was in the hold of said barge as ordered by said captain of the "Ocklahama," in building the bulkhead before mentioned, and when said barge listed and started to turn over, and as the same was sinking, your respondent undertook to escape from the hold of said barge and was greatly injured by the falling of said wheat, the cargo upon said barge, and was thrown about and bruised and injured, and suffered great bodily pain. Admits that William Boyce, your respondent, now claims to have been thrown down and injured as a result of the listing of said barge. Denies that said accident happened or the losses, damage, injury, and destruction above set forth were occasioned, done or occurred without the fault, privity or knowledge of the petitioners and libellants herein, The Oregon Railway & Navigation Co., and The Oregon Short Line & Utah Northern Railway Co., or either of them, but your respondent on the contrary alleges *that* the facts to be that the unseaworthiness, and the old and rotten condition of said barge and the negligence

in overloading the same were each and all of them the causes
91 of said losses, damage and injury and destruction, and were each and all of them with the full privity and knowledge of the libellants and petitioners above named, and each of them. Denies that the said loss, damage, injury or destruction as described in said libel and petition, or any loss, damage, injury or destruction in this behalf, were due solely or at all to the perils of the sea. Your respondent William Boyce admits that on or about the 15th day of November, 1892, he commenced an action against the libellants and petitioners, to recover damages in the sum of $15,000 for his injuries so received as alleged.

5th. Denies that none of the men on board the said barge "Columbia" were officers, agents or employees of the Oregon Railway & Navigation Co. Denies that the said barge was in all respects or in any respect sound, staunch or seaworthy. Denies that the injury to said wheat or to your respondent did not occur by reason of any negligence on the part of either of these petitioners or libellants herein, or either of them, or of their agents or servants. Denies that said loss and injury as above alleged was caused solely or at all by a peril over which your petitioner- or either of them had no control or that the injury could have been prevented by the exercise of any care on the part of the petitioners and libellants, or either of them, their officers or agents, or employees, but your respondent alleges the facts to be that all of said loss, or injury or damage to your respondent, William Boyce, did occur by reason of the fault and negligence of said petitioners and libellants herein, and both of them, and that by the exercise of reasonable diligence and
92 care upon the part of said petitioners and libellants and both of them, it would never have occurred, and was caused wholly and solely by the want of care upon the part of them. Denies that your respondent, William Boyce, well knew the danger connected with working in the hold of said barge, or that said danger was one or any of the risks of his employment. Denies that the same was assumed voluntarily or that your respondent had a full or any knowledge of the danger connected therewith, but alleges the facts to be that your respondent was employed as deck hand upon the said steamboat "Ocklahama," and was under the command and subject to the control of Marshal Short, its captain, that he was ordered as aforesaid to go to and upon said barge "Columbia," by said Marshal Short, captain, and assist in building the bulkhead, that he did not know the danger connected with working in the hold of said barge, that as deck hand upon the steamboat "Ocklahama," the risks and dangers incident to his employment were only those ordinarily connected with the handling of said steamboat. Denies that the injuries resulting to the said William Boyce, your respondent, and to the estate of Marshal Short and Gus Peterson were not caused by any negligence or lack of care or skill on the part of the petitioners or any of their officers, agents or employees or were the results solely of the contributory negligence of the said Marshal Short, William Boyce and Gus Peterson or either of them in entering or remaining in the hold of the said barge, well knowing the danger con-

nected with the working therein. Alleges the truth to be that the injuries resulting to the said William Boyce were solely and
93 entirely caused by the negligence and carelessness of your petitioners and libellants herein, The Oregon Railway & Navigation Company and The Oregon Short Line & Utah Northern Railway Company and both of them, their officers and agents, in carelessly and negligently overloading the said barge "Columbia" far beyond her carrying capacity and in running and operating the said barge "Columbia," as a sound, staunch and seaworthy barge or lighter with a full knowledge that said barge was old, rotten, leaky and unseaworthy and totally unfit for use.

And further answering the libel and petition herein, the respondent William Boyce alleges the following facts:

1. That at all times hereinafter mentioned the libellants and petitioners herein, The Oregon Railway & Navigation Company and The Oregon Short Line & Utah Northern Railway Company were corporations as hereinbefore set forth, and common carriers of passengers and freight for hire within the State of Oregon.

2. That for a long time before and on the 22d day of October, A. D. 1892, said libellant carelessly and negligently had in its possession, under its control and in its employment a certain barge called the "Columbia," and used the same in the transportation of freight to and upon the Willamette and Columbia rivers, from its docks in Portland, Oregon, to its docks in Asteria, Oregon.

3. The said barge "Columbia" was improperly constructed and unsafe for the purpose to which it was applied for the reason
94 that its bottom was round instead of flat, and that said barge was old, rotten, worn, unsound, decayed and utterly unseaworthy, leaky and without suitable pumps or pumping apparatus, and entirely unfit and inadequate for the purpose to which it was by said libellants applied, all of which defectiveness, unfitness and inadequacy were well known to said libellants.

4. That on or about the 19th day of October, A. D. 1892, said libellants well knowing its said condition, carelessly and negligently loaded said barge with sacks of wheat at its dock in Portland, Oregon, and in an unskillful and unsafe manner by piling the same loosely and insecurely to a great height upon the central portion of the dock of said barge and to and around the hatchway in said dock and to the amount of about — tons, which was far beyond the carrying capacity of said barge, in its said condition or even had it been sound and seaworthy, and carelessly and negligently took said barge to the "bone yard," so called, and there to remain from the 19th day of October, A. D. 1892, until the afternoon of the 21st day of October, A. D. 1892, and thereby to accumulate a large quantity of water in its hold through leaks in its bottom and sides.

5. That on or about the 21st and 22d days of October, A. D. 1892, William Boyce was in the said libellants' employment as deck hand on the steamboat the "Ocklahama," running and operating as a towboat on the Willamette and Columbia rivers and under the authority and subject to the orders and direction of Marshal

B. Short, the master and captain thereof and the agent of said libellants.

95 6. That on the afternoon of the 21st day of October, A. D. 1892, said Marshal B. Short, under and — pursuance of the orders and instructions of said libellants, took said barge so improperly constructed and unsafe and so unskillfully, carelessly and negligently overloaded and leaky as aforesaid under his charge and control and towed the same with said steamboat the "Ocklahama," having said William Boyce on board as deck hand as aforesaid, from said libellants' dock at Portland, Oregon, on and over the Willamette and Columbia rivers to one of its docks at Astoria, Oregon.

7. That said barge during the entire trip from Portland, Oregon, to Astoria, Oregon, aforesaid, rolled and pitched from side to side by reason of being overloaded and being leaky and having water in its said hold.

8. That on the morning of October 22d, A. D. 1892, and as said barge was about to land at the said libellants' and petitioners' dock or wharf said barge moving at ordinary rate of speed, that owing to the fact that said barge was so carelessly and negligently overloaded as aforesaid and beyond her carrying capacity, the said barge became and was unmanageable, and said barge ran its prow under said dock or wharf of said libellants and petitioners, and the anchor negligently and carelessly hanging over the side of said barge was caught upon one of the piles of said dock or wharf and the other fluke was forced through the side of said barge, which would not have been done if said barge had been sound and staunch.

96 9. That on October 22d, A. D. 1892, at said libellants' dock at Astoria, Oregon, while said barge was still attached to said steamboat "Ocklahama" and in tow thereof and in charge and under the control of said Marshal B. Short, master and captain as aforesaid, said William Boyce under the authority and in obedience to the order of said Marshal B. Short as such master and captain in charge and in control of said barge as aforesaid, the agent of the said libellants, lawfully went from the deck of said steamboat "Ocklahama" to and upon the said barge "Columbia" and into the hold thereof to assist in repairing a leak therein, and while in said hold so engaged in obedience to the orders and directions of said Marshal B. Short as such master and captain as aforesaid and without any fault, negligence, want of due care or caution upon the part of your respondent, but solely owing to the unsound and unsafe condition of said barge and said careless and negligent overloading and owing to the amount of water collected in the hold of said barge by reason of its said leaky condition, and to the unskillful, loose and careless piling of said sacks of wheat upon the deck of said barge, and owing to the carelessness and negligence of said libellants as aforesaid said barge suddenly turned one side or broke and gave away, thereby causing said load of wheat to move or shift, whereby a large quantity of water came into the hold of said barge — said deck was broken in.

10. That as said barge was sinking your respondent, William

Boyce, in endeavoring to save his own life, undertook to escape from the hold of said barge, and because of the careless and un-
97 skillful manner in which said barge was loaded, and the old, rotten, unsafe, defective, and the leaky and imperfect condition of said barge, all of which was well known to the libellants herein, your respondent was greatly injured by the falling sacks of wheat, the cargo upon said barge, and was thrown and bruised and injured, and suffered great bodily pain, and his right arm was broken just above the elbow, and the muscles detached from the bones in such a manner as to leave his said right arm weak, sore and disabled, and that he is informed and therefore believes that his said right arm will never become strong and well, and that its usefulness to assist him in making a livelihood is at an end, and it was by the labor of his arms and hands that he gained a living.

11. That by reason of the carelessness and negligence — libellants aforesaid, your respondent became sick, sore, lame and disabled and suffered great bodily pain and mental anguish and was confined to his bed for a long period of time, and was confined in the St. Vincent's hospital from the 23d day of October, A. D. 1892, up to the 27th day of December, A. D. 1892, and since leaving said hospital your respondent has been sick, sore and disabled and incapacitated from earning his living, and has lost all profits of his labor since the said 22d day of October, A. D. 1892, to wit, the sum of forty dollars per month and his board and lodging, and has become permanently lame and incapacitated from following his usual occupation of deck hand, and from all hard and heavy work, to his damage in the sum of fifteen thousand dollars.

98 Wherefore, your respondent prays this honorable court that the order heretofore made herein, directing that an appraisement of the value of said barge "Columbia" be made and that monition issue against all persons claiming damages for said loss, destruction, damage or injury occasioned as aforesaid be vacated and set aside; and that your respondent be decreed to recover from said libellants and petitioners the full amount of his damage in this behalf, to wit, the sum of fifteen thousand dollars sustained, together with the costs and disbursements herein, and for such other, further and different relief as — this honorable court may seem meet.

CHAS. F. LORD,
*Proctor for Respondent.*

STATE OF OREGON, }
*Multnomah County.* }

I, William Boyce, being first duly sworn, depose and say, that I am the respondent named in the foregoing answer and that I have read the same and that all the facts are true as alleged therein, to the best of my knowledge and belief.

WILLIAM BOYCE.

Subscribed and sworn to before me this 7th day of February, A. D. 1893.

[SEAL.]

CHAS. F. LORD,
*Notary Public for Oregon.*

STATE OF OREGON,
*Multnomah County,* } ss:

Due service of the within answer is hereby accepted in
99 Multnomah county, Oregon, this — day of February, 1893, by receiving a copy thereof duly certified to as such by Chas. F. Lord, proctor for respondent.

W. W. COTTON,
*Proctor for the Oregon Railway & Navigation Company.*
W. W. COTTON,
*Proctor for Oregon Short Line & Utah Northern Railway Co.*

(Endorsed:) Filed Feb. 10th, 1893. R. B. Lamson, clerk.

And afterwards, to wit, on the 1st day of March, 1893, there was duly filed in said court, exceptions to answers of Malvina Short, Sven Anderson, Anna C. Larson and Wm. Boyce, in words and figures as follows, to wit:

In the District Court of the United States for the District of Oregon.

In the Matter of the Petition of the Oregon Railway & Navigation Company as the Owner of the Barge Columbia and the Oregon Short Line & Utah Northern Railway Company as the Lessee Thereof.

The exceptions of the libellants and petitioners, The Oregon Short Line & Utah Northern Railway Company and The Oregon Railway & Navigation Company, and each of them, to the answer of Malvina Short, administratrix of the estate of Marshal B. Short, deceased, allege that the said answer is informal and insufficient as follows:

100 First exception. For that the allegations contained in the said answer found in the third paragraph on page 6 thereof are irrelevant and impertinent and ought to be expunged.

Second exception. For that the allegations contained in the sixth paragraph of the said answer on page 7 thereof are irrelevant and impertinent and ought to be expunged.

Third exception. For that the allegations contained in the eighth paragraph of the said answer on page 7 thereof are irrelevant and impertinent and ought to be expunged.

Fourth exception. The libellants and petitioners and each of them except to all of the further answer of the said Malvina Short, commencing on line 24, page 5, and extending to and including line 9, page 8, for the reason that neither the said answer nor any part thereof alleges or states facts showing or tending to show that the

injury to the said Marshal B. Short or to the estate of the said Marshal B. Short was done, occasioned or incurred by any act of negligence on the part of the libellants or petitioners or either of them, or with the privity or knowledge of such libellants or petitioners or either of them, and for the reason that no facts are stated in the said further answer above referred to or in any part thereof constituting any ground why the libellants or petitioners and each of them should not be entitled to limit their liability to the appraised value of the said barge "Columbia" as prayed for in the libel and petition herein on account of the injury alleged to have been received by the said Marshal B. Short or his said estate by reason of the
101 destruction of the said barge "Columbia," referred to in the libel and petition filed herein.

Fifth exception. The libellants and petitioners and each of them except to the answer of the said Malvina Short and each and every part thereof for the reason that the said answer nowhere alleges or states facts showing or tending to show that the injury to the said Marshal B. Short or his estate was done, occasioned or incurred by any act or negligence on the part of the libellants or petitioners or either of them, or with the privity or knowledge of such libellants or petitioners or either of them, and for the further reason that no facts are stated in the answer or in any part thereof constituting any ground why the said libellants and petitioners should not be entitled to limit their liability to the appraised value of the said barge "Columbia" as prayed for in the libel and petition herein on account of the injury alleged to have been received by the said Marshal B. Short or his estate by reason of the destruction of the said barge "Columbia."

In all of which particulars the said libellants and petitioners and each of them humbly insist that the said answer of the said Malvina Short is imperfect, irrelevant and impertinent.

Wherefore the libellants and petitioners and each of them except thereto and humbly pray that the impertinence of the said answer excepted to as aforesaid may be expunged with costs and that the libellants and petitioners and each of them may be held entitled to the relief demanded in the libel and petition and may be entitled to a limitation of liability to the extent of the appraised
102 value of the said barge "Columbia" as prayed for in the libel and petition filed herein.

W. W. COTTON AND
ZERA SNOW,
*Proctors for Libellants and Petitioners.*

Due service of the within exceptions by certified copy as prescribed by law is hereby admitted at Portland, Or., this 23d day of Feb., 1893.

J. F. & E. B. WATSON,
*Attorneys for Malvina Short.*

(Endorsed:) Filed Mar. 1, 1893. R. B. Lamson, clerk.

In the District Court of the United States for the District of Oregon.

In the Matter of the Petition of the Oregon Railway & Navigation Company as the Owner of the Barge "Columbia" and the Oregon Short Line & Utah Northern Railway Company as the Lessee Thereof.

The exceptions of the libellants and petitioners, The Oregon Railway & Navigation Company and The Oregon Short Line & Utah Northern Railway Company, and each of them, to the answer of Sven Anderson, administrator of the estate of John August Peterson, deceased, allege that the said answer is informal and insufficient as follows:

103 First exception. For that the allegations contained in the third paragraph of the said answer on page 6 thereof are irrelevant and impertinent and ought to be expunged.

Second exception. For that the allegations contained in the fourth paragraph of the said answer on page 6 thereof are irrelevant and impertinent and ought to be expunged.

Third exception. For that the allegations contained in the sixth paragraph on page 7 of the answer are irrelevant and impertinent and ought to be expunged.

Fourth exception. For that the allegations contained in the seventh paragraph of the said answer on page 7 thereof are irrelevant and impertinent and ought to be expunged.

Fifth exception. For that the allegations contained in the eighth paragraph of the said answer on page 8 thereof are irrelevant and impertinent and ought to be expunged.

Sixth exception. For that the allegations contained in the ninth paragraph of the said answer on page 8 thereof are irrelevant and impertinent and ought to be expunged.

Seventh exception. For that the allegations contained in the tenth paragraph of the said answer on page 9 thereof are irrelevant and impertinent and ought to be expunged.

Eighth exception. The libellants and petitioners, and each of them, except to all of the further answer of the said Sven Anderson commencing line 35, page 5, and extending to and including

104 line 3, page 9, for the reason that neither the said answer nor any part thereof alleges or states facts showing or tending to show that the injury to the said John August Peterson or his estate was done, occasioned, or incurred by any act of negligence on the part of the libellants or petitioners, or either of them, or with the privity or knowledge of such libellants or petitioners, or either of them, and for the further reason that no facts are stated in the portion of the answer above referred to, or any part thereof, constituting any ground why the libellants and petitioners and each of them should not be entitled to limit their liability to the appraised value of the said barge "Columbia" as prayed for in the libel and petition herein on account of the injury alleged to have been received by the said John August Peterson or his estate by reason of the destruction

of the said barge "Columbia" referred to in the libel and petition filed herein.

Ninth exception. The libellants and petitioners, and each of them, except to the answer of the said Sven Anderson and each and every part thereof for the reason that the said answer nowhere alleges or states facts showing or tending to show that the injury to the said John August Peterson or his estate was done, occasioned or incurred by any act or negligence on the part of the libellants or petitioners, or either of them, or with the privity or knowledge of such libellants or petitioners, or either of them, and for the further reason that no facts, as stated in the answer or any part thereof, constitute any ground why the said libellants and petitioners, or either of
105 them, should not be entitled to limit their liability to the appraised value of the said barge "Columbia" as prayed for in the libel and petition herein on account of the injury alleged to have been received by the said John August Peterson or his estate by reason of the destruction of the said barge "Columbia."

In all of which particulars the said libellants and petitioners humbly insist that the said answer of the said Sven Anderson is imperfect, irrelevant and impertinent.

Wherefore, the libellants and petitioners and each of them except thereto and humbly pray that the impertinence and irrelevancy of the said answer, excepted to as aforesaid, may be expunged with costs and that libellants and petitioners, and each of them, may be entitled to the relief demanded in the libel and petition, and may be entitled to the limitation of liability to the extent of the appraised value of the said barge "Columbia" as prayed for in the libel and petition filed herein.

W. W. COTTON AND
ZERA SNOW,
*Proctors for Libellants and Petitioners.*

Due service of the within exceptions by certified copy as prescribed by law is hereby admitted at Portland, Or., this 23d day of Feb., 1893.

J. F. & E. B. WATSON,
*Attorneys for Sven Anderson.*

(Endorsed:) Filed March 1, 1893. R. B. Lamson, clerk.

106 In the District Court of the United States for the District of Oregon.

In the Matter of the Petition of the Oregon Railway & Navigation Company as the Owner of the Barge "Columbia" and the Oregon Short Line & Utah Northern Railway Company as Lessee Thereof.

The exceptions of the libellants and petitioners, The Oregon Short Line & Utah Northern Railway Company, and The Oregon Railway & Navigation Company, and each of them, to the answer

of Anna C. Larson, mother of John August Peterson, deceased, allege that the said answer is informal and insufficient as follows:

First exception. For that the allegations contained in the said answer found in the third paragraph on page 6 thereof are irrelevant and impertinent and ought to be expunged.

Second exception. For that the allegations contained in the sixth paragraph of the said answer on page 7 thereof are irrelevant and impertinent and ought to be expunged.

Third exception. For that the allegations of the said answer found in the seventh paragraph thereof are irrelevant and impertinent and ought to be expunged.

107 Fourth exception. For that the allegations in the seventh paragraph of the said answer found on page 8 thereof are irrelevant and impertinent and ought to be expunged.

Fifth exception. For that the allegations in the eight- paragraph of the said answer found on page 8 thereof are irrelevant and impertinent and ought to be expunged.

Sixth exception. For that the allegations in the ninth paragraph of the said answer thereof are irrelevant and impertinent and ought to be expunged.

Seventh exception. For that the allegations in the tenth paragraph of the said answer thereof found on page 9 thereof are irrelevant and impertinent and ought to be expunged.

Eighth exception. For that the allegations in the eleventh paragraph of the said answer found on page 9 thereof are irrelevant and impertinent and ought to be expunged.

Ninth exception. For that the allegations in the twelfth paragraph of the said answer are irrelevant and impertinent and ought to be expunged.

Tenth exception. For that the allegations in the thirteenth paragraph of the said answer found on page 10 thereof, are irrelevant and impertinent and ought to be expunged.

Eleventh exception. The libellants and petitioners and each of them except to all of the further answer of the said Anna C. Larson, commencing in line 23, page 5, and extending to and including line 5, page 10, for the reason that neither the said answer

108 nor any part thereof alleges or states facts showing or tending to show that the injury to the said John August Peterson was done, occasioned or incurred by any act of negligence on the part of the libellants or petitioners, or either of them, or with the privity or knowledge of such libellants and petitioners, or either of them, and for the reason that no facts are stated in that portion of the said answer above referred to or any part thereof constituting any ground why the libellants and petitioners and each of them should not be entitled to limit their liability to the appraised value of the said barge "Columbia," as prayed for in the libel and petition herein on account of the injury alleged to have been received by the said John August Peterson by reason of the destruction of the said barge "Columbia" referred to in the libel and petition filed herein.

Twelfth exception. The libellants and petitioners and each of

them except to this answer of the said Anna C. Larson and each and every part thereof, for the reason that the said answer nowhere alleges or states facts showing or tending to show that the injury to the said John August Peterson was done, occasioned or incurred by any act or negligence on the part of the libellants or petitioners or either of them or with the privity or knowledge of such libellants or petitioners, or either of them, and for the further reason that no facts are stated in the answer or any part thereof constituting any ground why the said libellants and petitioners, or either of them,

109 should not be entitled to limit their liability to the appraised value of the said barge "Columbia" as prayed for in the libel and petition herein on account of the injury alleged to have been received by the said John August Peterson by reason of the destruction of the said barge "Columbia."

In all of which particulars the said libellants and petitioners humbly insist that the said answer of the said Anna C. Larson was imperfect, irrelevant, impertinent and scandalous.

Wherefore the libellants and petitioners and each of them except thereto and humbly pray that the impertinence and scandal of the said answer excepted to as aforesaid may be expunged with costs, and that the libellants and petitioners and each of them may be entitled to the relief demanded in the libel and petition and may be entitled to a limitation of liability to the extent of the appraised value of the said barge "Columbia" as prayed for in the libel and petition filed herein.

W. W. COTTON AND
ZERA SNOW,
*Proctors for Libellants and Petitioners.*

Due service of the within exceptions by certified copy as prescribed by law is hereby admitted at Portland, Or., this 23d day of Feb., 1893.

J. F. & E. B. WATSON,
*Attorneys for Anna C. Larson.*

(Endorsed:) Filed March 1, 1893. R. B. Lamson, clerk.

110 In the District Court of the United States for the District of Oregon. In Admiralty.

The Barge "Columbia;" Oregon Railway & Navigation Company and The Oregon Short Line & Utah Northern Railway Company, Libellants and Petitioners.

The exceptions of the libellants and petitioners and each of them to the amended answer of William Boyce, respondent in this cause, allege that the said answer is informal and insufficient as follows:

First exception. For that the allegations in the said amended answer commencing with the word "and" in the thirty-fourth line, page 1, to and including the word "Oregon" in the fourth line, page 2, are scandalous, irrelevant and impertinent and ought to be expunged.

Second exception. For that the allegations in the said amended answer commencing with the word "and" in line 29, page 2, to and including the word "bulkhead" in line 33, page 2, are irrelevant and impertinent and ought to be expunged.

Third exception. For that the allegations in the said amended answer commencing with the word "but" in line 10, page 5, to and including the word "barge" in line 16, page 5, are impertinent and irrelevant and ought to be expunged.

Fourth exception. For that the allegations in the said
111 amended answer commencing with the word "that" in line 16, page 5, to and including the word "steamboat," line 18, page 5, are irrelevant and impertinent and ought to be expunged.

Fifth exception. For that the allegations in the said amended answer and each of them found in the fourth paragraph of the separate answer on page 6 are irrelevant and impertinent and constitute no ground of defense and ought to be expunged.

Sixth exception. For that the allegations in the said amended answer found in the sixth paragraph of the separate defense on page 7 are irrelevant and impertinent and constitute no defense to the relief prayed in the petition and libel and ought to be expunged.

Seventh exception. For that the allegations in the said amended answer found in the seventh paragraph of the separate answer on page 7 are irrelevant and impertinent and constitute no defense to the relief prayed in the libel and petition and ought to be expunged.

Eighth exception. For that the allegations in the said amended answer commencing with the word "negligently," in line 26, page 7, to and including the word "barge" in line 27, page 7, are irrelevant and impertinent and ought to be expunged.

Ninth exception. For that the allegations in the said amended answer found in the ninth paragraph of the separate answer and defense on page 7 of the said amended answer are irrelevant and impertinent and ought to be expunged.

Tenth exception. The libellants and petitioners and each
112 of them except to the said amended answer and each and every part thereof for the reason that the said amended answer and no part thereof alleges or states facts showing or tending to show that the alleged injury to the said William Boyce was done, occasioned or incurred by any act of negligence on the part of the libellants or petitioners, or either of them, or with the privity or knowledge of such libellants or petitioners or either of them and for the further reason that no facts are stated in the said amended answer or any part of the said answer constituting any ground why the said libellants and petitioners and each of them should not be entitled to limit their liability to the appraised value of the said barge "Columbia" as prayed for in the libel and petition herein on account of any alleged injury received by the said William Boyce, by reason of the destruction of the said barge as stated in the said libel and petition filed herein.

In all of which particulars the said libellants and petitioners

humbly insist that the respondent's said amended answer is imperfect, irrelevant, impertinent and scandalous.

Wherefore, the libellants and petitioners and each of them except thereto, and humbly pray that the impertinence and scandal of the said amended answer, excepted to as aforesaid, may be expunged with costs and that the libellants and petitioners be entitled to the relief and may be entitled to the limitation of liability to the extent of the appraised value of the said barge "Columbia," as prayed for in the libel and petition filed herein.

W. W. COTTON AND
ZERA SNOW,
*Proctors for the Libellants and Petitioners.*

113 Due service of the within exceptions by certified copy as prescribed by law is hereby admitted at Portland, this 22d day of Feb., 1893.

CHAS. F. LORD,
*Attorney for William Boyce.*

(Endorsed:) Filed March 1, 1893. R. B. Lamson, clerk.

And afterwards, to wit, on the 1st day of March, 1893, there was duly filed in said court the following stipulations in words and figures as follows, to wit:

In the District Court of the United States for the District of Oregon.

In the Matter of the Petition of the Oregon Railway & Navigation Company as the Owner of the Barge "Columbia" and the Oregon Short Line & Utah Northern Railway Company as the Lessee Thereof.

It is hereby stipulated by and between the proctors for the libellants and petitioners, The Oregon Railway & Navigation Company, and The Oregon Short Line & Utah Northern Railway Company, and the proctor for Malvina Short, administratrix of Marshal B. Short, deceased, that no replication, general or special, need be filed by the said libellants and petitioners, The Oregon Railway & Navigation Company and The Oregon Short Line & Utah Northern Railway Company to the answer filed by the said Malvina
114 Short in the above proceedings, and that all parts of the said answer alleging new facts and each and every part of the same, shall be considered as fully denied by the said libellants, The Oregon Railway & Navigation Company and The Oregon Short Line & Utah Northern Railway Company and each of them.

W. W. COTTON AND
ZERA SNOW,
*Proctors for Libellants and Petitioners.*
J. F. & E. B. WATSON,
*Proctors for Malvina Short.*

(Endorsed:) Filed March 1, 1893. R. B. Lamson, clerk.

In the District Court of the United States for the District of Oregon.

In the Matter of the Petition of the Oregon Railway & Navigation Company as Owner of the Barge "Columbia" and the Oregon Short Line & Utah Northern Railway Company as the Lessee Thereof.

It is hereby stipulated by and between the proctors for the libellants and petitioners, The Oregon Railway & Navigation Company and The Oregon Short Line & Utah Northern Railway Company, and the proctor for Sven Anderson, administrator of John August Peterson, deceased, that no replication, general or special, need be filed by the said libellants and petitioners, The Oregon Railway & Navigation Company and The Oregon Short Line & Utah
115 Northern Railway Company, to the answer filed by the said Sven Anderson in the above proceedings, and that all parts of the said answer alleging new facts, and each and every part of the same shall be considered as fully denied by the said libellants, The Oregon Railway & Navigation Company and The Oregon Short Line & Utah Northern Railway Company, and each of them.

W. W. COTTON AND
ZERA SNOW,
*Proctors for the Libellants and Petitioners.*
J. F. & E. B. WATSON,
*Proctors for Sven Anderson.*

(Endorsed:) Filed March 1, 1893. R. B. Lamson, clerk.

In the District Court of the United States for the District of Oregon.

In the Matter of the Petition of the Oregon Railway & Navigation Company as Owner of the Barge "Columbia" and the Oregon Short Line & Utah Northern Railway Company as Lessee Thereof.

It is hereby stipulated by and between the proctors for the libellants and petitioners, The Oregon Railway & Navigation Company and The Oregon Short Line & Utah Northern Railway Company, and the proctor for Anna C. Larson, mother of John August Peterson, deceased, that no replication, general or special, need be filed by the said libellants and petitioners, The Oregon Railway &
116 Navigation Company and The Oregon Short Line & Utah Northern Railway Company, to the answer filed by the said Anna C. Larson in the above proceeding, and that all parts of the said answer alleging new facts, and each and every part of the same shall be considered as fully denied by the said libellants, The Oregon Railway & Navigation Company and The Oregon Short Line & Utah Northern Railway Company, and each of them.

W. W. COTTON AND
ZERA SNOW,
*Proctors for the Libellants and Petitioners.*
J. F. & E. B. WATSON,
*Proctors for Anna C. Larson.*

(Endorsed:) Filed March 1, 1893. R. B. Lamson, clerk.

In the District Court of the United States for the District of Oregon.
In Admiralty.

The Barge "Columbia;" Oregon Railway & Navigation Company, and The Oregon Short Line & Utah Northern Railway Company, Libellants and Petitioners.

It is hereby stipulated by and between the proctors for the libellants and petitioners, The Oregon Railway & Navigation Company and The Oregon Short Line & Utah Northern Railway Company and the proctor for William Boyce, that no replication, general or special, need be filed by the said libellants and petitioners,
117 The Oregon Railway & Navigation Company and The Oregon Short Line & Utah Northern Railway Company to the amended answer filed by the said William Boyce in the above proceeding, and that all parts of the said amended answer alleging new facts, and each and every part of the same, shall be considered as denied by the said libellants, The Oregon Railway & Navigation Company and The Oregon Short Line & Utah Northern Railway Company, and each of them.

W. W. COTTON AND
ZERA SNOW,
*Proctors for the Libellants and Petitioners.*
CHAS. F. LORD,
*Proctor for William Boyce.*

(Endorsed:) Filed March 1, 1893. R. B. Lamson, clerk.

In the District Court of the United States for the District of Oregon.

The Barge "Columbia;" Oregon Railway & Navigation Company and Oregon Short Line & Utah Northern Railway Company, Libellants and Petitioners.

It is hereby stipulated by and between the proctor for the Oregon Railway & Navigation Company and the Oregon Short Line & Utah Northern Railway Company and the proctor for William Boyce, that the said Oregon Railway & Navigation Company and the said Oregon Short Line & Utah Northern Railway Company and
118 each of them, shall have to and including the 15th day of February, 1893, in which to file exceptions to the answer filed by the said William Boyce or any part thereof, on any ground or cause whatsoever and shall have until the 15th day of February, 1893, in which, if desirable, to amend the libel and petition filed by the said Oregon Railway & Navigation Company and the Oregon Short Line & Utah Northern Railway Company; provided, however, that the proctor for William Boyce shall have the right during the said time to amend his answer or any part thereof filed in this cause.

W. W. COTTON,
*Proctor for Libellants and Petitioners.*
CHAS. F. LORD,
*Proctor for Wm. Boyce.*

(Endorsed:) Filed March 1, 1893. R. B. Lamson, clerk.

In the District Court of the United States for the District of Oregon.

The Barge "Columbia;" Oregon Railway & Navigation Company and The Oregon Short Line & Utah Northern Railway Company, Libellants and Petitioners.

It is hereby stipulated by and between the proctor for the Oregon Railway & Navigation Company and the Oregon Short Line & Utah Northern Railway Company and the proctor for Annie C. Larson, Sven Anderson and Malvina Short that the said Oregon
119 Railway & Navigation Company and the said Oregon Short Line & Utah Northern Railway Company and each of them, shall have to and including the fifteenth day of February, 1893, in which to file exceptions to the answers filed by the said Annie C. Larson, Sven Anderson and Malvina Short, or any part or either of said answers for any ground or cause whatsoever, and shall have until the 15th day of February, 1893, in which, if desirable, to amend the libel and petition filed by the said Oregon Railway & Navigation Company and the Oregon Short Line & Utah Northern Railway Company.

W. W. COTTON,
*Proctor for Libellants and Petitioners.*
WATSON, BEEKMAN & WATSON,
*Proctors for Annie C. Larson, Sven Anderson, and Malvina Short.*

(Endorsed:) Filed March 1, 1893. R. B. Lamson, clerk.

In the District Court of the United States for the District of Oregon.

The Barge "Columbia;" Oregon Railway & Navigation Company and Oregon Short Line & Utah Northern Railway Company, Libellants and Petitioners.

It is hereby stipulated by and between the proctors for the
120 libellants and petitioners, The Oregon Railway & Navigation Company and The Oregon Short Line & Utah Northern Railway Company, and the proctors for Robert Balfour, Stephen Williamson, Alexander Guthrie, Robert Brodie Forman, R. Bruce and Walter J. Burns, partners, doing business in the city of Portland and elsewhere under the firm name of Balfour, Guthrie & Co., that no replication, general or special, need be filed by the said libellants and petitioners, The Oregon Railway & Navigation Company and The Oregon Short Line & Utah Northern Railway Company, or either of them, to the answer filed by the said Balfour, Williamson, Guthrie, Forman, Burns and Bruce in the above proceeding, and that all parts of the said answer alleging new facts, and each and every part of the same, shall be considered as fully denied by the said libellants, The Oregon Railway & Navigation

Company and The Oregon Short Line & Utah Northern Railway Company, and each of them.

W. W. COTTON AND
ZERA SNOW,
*Proctors for the Libellants and Petitioners.*
WILLIAMS & WOOD,
*Proctors for Balfour, Guthrie & Co.*

(Endorsed:) Filed March 1, 1893. R. B. Lamson, clerk.

And afterwards, to wit, on the 25th day of May, 1893, there was duly filed in said court a stipulation, in words and figures as follows, to wit:

121 In the District Court of the United States for the District of Oregon.

The Barge "Columbia;" Oregon Railway & Navigation Company and The Oregon Short Line & Utah Northern Railway Company, Libellants and Petitioners.

It is hereby stipulated by and between W. W. Cotton, counsel for The Oregon Railway & Navigation Company and The Oregon Short Line & Utah Northern Railway Company, libellants and petitioners above named, and Chas. F. Lord, counsel for William Boyce, respondent in the above-entitled cause, that said respondent may withdraw and amend his amended answer and cross-libel herein.

W. W. COTTON,
*Counsel for Libellants and Petitioners.*
CHAS. F. LORD,
*Counsel for Respondent.*

(Endorsed:) Filed May 25, 1893. R. B. Lamson, clerk.

And afterwards, to wit, on the 25th day of May, 1893, there was duly filed in said court a second amended answer of William Boyce, in words and figures as follows, to wit:

122 In the District Court of the United States for the District of Oregon. In Admiralty.

The Barge "Columbia;" Oregon Railway & Navigation Company and The Oregon Short Line & Utah Northern Railway Company, Libellants and Petitioners.

To the Honorable C. B. Bellinger, judge of the district court of the United States for the district of Oregon:

William Boyce exhibits his second amended answer to the libel and petition of the Oregon Railway & Navigation Company and the Oregon Short Line & Utah Northern Railway Company, and answers and alleges as follows:

1st. Admits that article first of said libel and petition is true.

2d. Admits that article second of said libel and petition is true.

3d. Admits that on or about the 21st day of October, A. D. 1892 the barge or lighter "Columbia," referred to in said libel and petition, left Portland, Oregon, having on board a cargo of wheat to be transported by said barge from Portland, Oregon, to Astoria, Oregon, said wheat being a part of the cargo of the British ship "Westgate," destined to Liverpool, England. Your respondent alleges the fact to be that said barge "Columbia" was used as a barge and lighter and has always been so used; denies that said barge "Columbia" was seaworthy or in good order or condition or that said cargo of wheat was properly loaded thereon, but on the contrary your respondent alleges the truth to be that said barge or lighter was very unseaworthy and was in bad order and condition at said time, and these facts were at said time well known to the persons, owners of said barge, their lessees, their officers and agents and that said cargo of wheat was carelessly, negligently and improperly loaded on said barge, and said barge at said time was very much overloaded and beyond its carrying capacity, even had said barge been thoroughly sound, staunch and seaworthy; your respondent denies that all went well with said barge until on the night of the 21st day of October, A. D. 1892, when it reached Astoria, Oregon, but on the contrary owing to its being overloaded with wheat beyond its carrying capacity, careened, rolled and pitched upon the entire voyage from Portland to Astoria, Oregon. As to whether or not said barge intended to tie up alongside the dock of the Oregon Railway & Navigation Company, this respondent has no knowledge sufficient to form a belief. Admits that a float or pontoon, substantially as alleged in said libel and petition, was lying in the water in front of said dock for the purpose of preventing ships from chafing against the timbers of said dock. Denies that by reason of the darkness of the night rendered it impossible for the pilot or captain in charge of the "Ocklahama," the steamboat towing the said barge to see said float or pontoon. Denies that said barge or lighter ran against said float or pontoon. But alleges the facts to be that said barge being in tow of the
124 "Ocklahama" as aforesaid and under such headway and high rate of speed, and said barge was so negligently loaded as aforesaid that said barge ran into and under the wharf or dock and that the anchor was thrust through the side of said barge. Denies that said leakage was wholly caused by said condition, or that said timbers started by reason of colliding with said float or pontoon or wharf or dock, or that the same was wholly caused by attempting to make a landing, admits that said barge was taken into more shallow water by order of the persons in charge of said barge, or made examination to ascertain its condition or as to whether it was found it would probably float if pumps were used, your respondent has not sufficient knowledge to form a belief. Admits that said pumps were used. Admits that the cargo was entirely upon the deck of said barge.

Admits that the men in charge of said barge undertook to stop the leakage in said barge by building a bulkhead with sacks of

wheat around said leak, and alleges that your respondent, who was deck hand on board the steam tugboat, the "Ocklahama," having said barge in tow, — to go *and* on board said barge by the orders of his superior officers, and assist in building said bulkhead. Admits that in order to construct said bulkhead it was necessary to go into the hold of said barge. Admits that said Marshal Short, Gus Peterson and your respondent went into the hold of said barge for the purpose of building said bulkhead. Admits that the tide was ebbing at the time the said bulkhead was being so constructed, but as to whether said barge touched the ground your respondent has

125 not sufficient knowledge to form a belief. Alleges that it was nothing unusual for such a barge as the "Columbia" to take the ground or suddenly list when loaded beyond its carrying capacity, and that the strain to which said barge was thereby at that time subjected was severe and unusual and would not have injured said barge in any respect had it been sound, staunch and seaworthy, or had it not been so negligently overloaded. As to whether an examination was therein made by the men in charge of said barge as to her condition and position, or that such men thereupon concluded to continue with the work of undertaking to stop the said leak or that they believed that said barge would sink into the mud and remain upright your respondent has not sufficient knowledge to form a belief. Admits that said barge suddenly listed to one side and away from said dock and partially turned over and sank. Admits that said Marshal Short and Gus Peterson undertook to escape from the hold of said barge, and that they were caught by the falling cargo of the said barge, to wit, wheat in sacks piled in tiers upon the said barge and were crushed and killed. Admits that a large amount of said cargo was thrown into the water and the said barge was subjected to such a severe strain that its house was carried away and its hull injured, but alleges that any damage or injury — may have or did receive was caused wholly by the negligent loading of the same and was wholly due to the rotten and imperfect condition of the said barge "Columbia" and to the negligent manner in which the said steamtug the "Ocklahama" ran said barge

126 into said dock and not otherwise. And your respondent alleges the fact to be that while he was in the hold of the said barge as ordered by said captain of the "Ocklahama" in building the bulkhead before mentioned, and when said barge listed and started to turn over and as the same was sinking your respondent undertook to escape from the hold of said barge and was greatly injured by the falling of said wheat and cargo upon said barge and was thrown about and bruised and injured and suffered great bodily pain. Admits that William Boyce, your respondent, now claims to have been thrown down and injured as a result of the listing of said barge. Denies that said accident happened or the losses, damage or injury and destruction above set forth were occasioned, done or occurred without the fault, privity or knowledge of the petitioners and libellants herein, The Oregon Railway & Navigation Company and The Oregon Short Line & Utah Northern Railway Company or either of them. But your respondent, on the con-

trary, alleges the facts to be, that the unseaworthyness and the old and rotten condition of said barge, the negligence in overloading of the same and the negligence of the steamtug the "Ocklahama" in running said barge into the dock as aforesaid were each and all of them the causes of said losses, damage and injury and destruction, and were each and all of them with the full privity and knowledge of the libellants and petitioners above named and each of them. Denies that said losses, damage, injury or destruction as described in said libel and petition or any loss, damage, injury or de-
127 struction in this behalf was due solely or at all to the perils of the sea. Your respondent, William Boyce, admits that on or about the 15th day of November, A. D. 1892, he commenced an action against the libellants and petitioners herein to recover damages in the sum of $15,000 for his injuries so received as alleged.

5th. Denies that none of the men on board the said barge "Columbia" were officers, agents or employees of the Oregon Railway & Navigation Company. Denies that the said barge was in all or any respects sound, staunch, or seaworthy. Denies that the injury to said wheat or to your respondent occurred by reason of any negligence on the part of either of those petitioners or libellants herein, or either of them or of their agents or servants. Denies that said loss or injury as above alleged was caused solely or at all by a peril over which your petitioners, or either of them had no control, or that the injury made could have been prevented by the exercise of any care on the part of the petitioners and libellants, or either of them, their officers or agents or employees, but your respondent alleges the facts to be that all of said losses, injury or damage to your respondent, William Boyce, did occur by reason of the fault and negligence of said petitioners and libellants herein and both of them, and that by the exercise of reasonable diligence and care upon the part of said libellants and petitioners and both of them and their servants and agents it would never have occurred, and was caused wholly and solely by the want of care on the part of them. Denies that your respondent William Boyce well knew the danger con-
128 nected with working in the hold of said barge or that said damage was one of, or any of the risks of his employment. Denies that the same was assumed voluntarily, or that your respondent had a full or any knowledge of the damage connected therewith, but alleges the facts to be that your respondent was employed as a deck hand upon the said steamboat, the "Ocklahama," and was in command and subject to the control of Marshal Short, its captain, that he was ordered as aforesaid to go to and upon said barge "Columbia" by said Marshal Short, captain, and assist in building the bulkhead. That he did not know the danger with working in the hold of said barge, that as deck hand upon the steamtug "Ocklahama," having the said barge "Columbia" in tow, the risks and dangers incident to his employment were only those ordinarily connected with the handling of said steamboat. Denies that the injuries resulting to the said William Boyce, your respondent, and to the estate of Marshal Short and Gus Peterson were not caused by any negligence or lack of care or skill on the part of the peti-

tioners or any of their officers, agents or employees, or were the results solely of the contributory negligence of the said Marshal Short, William Boyce and Gus Peterson, or either of them, in entering or remaining in the hold of the said barge, well knowing the danger connected with the working therein, alleging the truth to be that the injuries resulting to the said William Boyce were solely and entirely caused by the negligence and carelessness and your petitioners and libellants herein, The Oregon Railway & Navigation Company, and The Oregon Short Line & Utah Northern Rail-
129 way Company, and both of them, their officers and agents in carelessly and negligently overloading the said barge "Columbia" far beyond her carrying capacity and in running and operating the said barge "Columbia" as a sound, staunch and seaworthy barge or lighter with a full privity or knowledge that the said barge was old, rotten, leaky and unseaworthy and was negligently and totally unfit for use and was negligently colliding with said wharf as aforesaid while in charge of said steamtug, the "Ocklahama."

And further answering the libel and petition herein, your respondent, William Boyce, alleges the following facts:

1. That at all the times hereinafter mentioned the libellants and petitioners herein, The Oregon Railway & Navigation Company and The Oregon Short Line & Utah Northern Railway Company, were corporations as hereinbefore set forth, and common carriers of passengers and freight for hire within the State of Oregon.

2. That for a long time before and on the 22d day of October, 1892, said libellants carelessly and negligently had in *its* possession and under *its* control and in *its* employment a certain barge called the "Columbia," used the same in the transportation of freight to and upon the Willamette and Columbia rivers from *its* docks in Portland, Oregon, to *its* docks in Astoria, Oregon.

3. That said barge Columbia was improperly constructed and unsafe for the purpose to which it was applied for the reason that its bottom was round instead of flat and that said barge was
130 old, rotten, worn, unsound, decayed and utterly unseaworthy, leaky and without suitable pumps or pumping apparatus, and entirely unfit and inadequate to which it was by said libellants applied, all of which defectiveness, unfitness and inadequacy were fully known to the said libellants.

4. That on or about the 19th day of October, A. D. 1892, said libellants, well knowing its said condition, carelessly and negligently loaded said barge with sacks of wheat at *its* dock in Portland, Oregon, and in an unskilled and unsafe manner by piling the same loosely and insecurely to a great height upon the central portion of the deck of said barge and to and around the hatchway on said deck and to the amount of about — tons, which was far beyond *its* carrying capacity of said barge, in its said condition, or even had it been sound and seaworthy, and carelessly and negligently took said barge to the "bone yard," so called, and there to remain from the 19th day of October, A. D. 1892, until the afternoon of the 21st day

of October, A. D. 1892, and thereby to collect a large quantity of water in its hold through leaks in its bottom and sides.

5. That the steamtug, the "Ocklahama," owned, run and operated by the libellants and petitioners herein as towboat on the Willamette and Columbia rivers — used in towing barges and lighters like the "Columbia" from place to place.

6. That your respondent, William Boyce, was in the employ of the libellants and petitioners herein and as deck hand on the steamtug the "Ocklahama," and as such employee was subject to
131 the orders and directions of Marshal B. Short, the master or captain thereof and the agent of the said libellants and petitioners.

7. That on the afternoon of the 21st day of October, A. D. 1892, said steamtug the "Ocklahama," in charge of the master thereof took said barge "Columbia" as aforesaid in tow (said barge having no power or locomotion itself), said William Boyce being on board said steamtug the "Ocklahama," and towed the same from libellants' and petitioners' docks in Portland, Oregon, to *its* said docks at Astoria, Oregon.

8. That on the morning of the 22d day of October, A. D. 1892, and as said steamtug the "Ocklahama," was about to land said barge "Columbia" at the libellants' and petitioners' dock or wharf at Astoria, Oregon, said steamtug having said barge "Columbia" lashed to its side, and in its said condition approached said dock or wharf at a high rate of speed, not using due care or caution in the premises, negligently ran the prow of said barge the "Columbia," under said dock or wharf and collided with the same with great force whereby one fluke of the anchor of said barge was forced into and through the side thereof making a leak therein and several spiles of said wharf were broken off, all of which would not have occurred had the steamtug the "Ocklahama" and those in charge thereof used reasonable care or caution in approaching said wharf.

9. That on October 22d, A. D. 1892, at said libellants' and petitioners' dock at Astoria, Oregon, while said barge was still attached to said steamtug the "Ocklahama," and in tow thereof, and in charge and under the control of the master or captain as
132 aforesaid, William Boyce, your respondent, under the authority and in obedience to the orders of said master or captain in charge of said steamtug, and agents of said libellants and petitioners, lawfully went from the deck of said steamtug "Ocklahama" to and upon said barge "Columbia" and into the hold thereof to assist in repairing a leak therein, and while in said hold so engaged in obedience to the orders and directions of said master or captain as aforesaid, and without any fault or negligence, want of due care or caution upon his part, but solely owing to the unsound and unsafe condition of said barge and careless and negligent overloading of the same, and owing to the amount of water collected in the hold thereof by reason of its leaky condition and to the unskillful, loose and careless piling of said sacks of wheat upon the deck of said barge, and owing to the negligent and careless manner in which said steamtug the "Ocklahama" managed said barge

"Columbia," by causing it to collide with the spiles of said wharf or dock said barge suddenly turned to one side or broke and gave way, thereby causing said load of wheat to move or shift, whereby a large quantity of water came into the hold of said barge and the deck thereof was broken into.

10. That as said barge was sinking, your respondent William Boyce, in endeavoring to save his own life, undertook to escape from the hold of said barge, and because of the careless and unskillful manner in which said barge was loaded, and the old, rotten,

133 unsafe, defective, and leaky and imperfect condition of said barge, all of which was well known to the petitioners and libellants herein, and owing to the negligent and careless manner in which said steamtug the "Ocklahama" managed the said barge "Columbia," by causing it to collide with the spiles of said wharf or dock, your respondent was greatly injured by the falling sacks of wheat, cargo upon said barge, and was thrown about and bruised and injured and suffered great bodily pain, and his right arm was broken above the elbow and the muscles detached from the bones in such a manner as to leave his said right arm weak, sore and disabled, and that he is informed, and therefore believes, that his said right arm will never become strong and well, and that its usefulness to assist him in making a livelihood is at an end, and it was by the labor of his arms and hands that he gained a living.

11. That by reason of the carelessness and negligence of the libellants aforesaid, your respondent became sick, sore, lame and disabled and suffered great bodily pain and mental anguish, and was confined to his bed for a long period of time, and was confined to the St. Vincent's hospital from the 23d day of October, A. D. 1892, up to the 27th day of December, A. D. 1892, and since leaving said hospital your respondent has been sick, sore and disabled and incapacitated from earning his living, and has lost all profits of his labor since the said 23d day of October, A. D. 1892, to wit, the sum of forty dollars per month and his board and lodging and has become permanently lame and incapacitated from following his usual occupation of deck hand and from all hard and heavy work, to his damage in the sum of fifteen thousand dollars.

134 12. That your libellants and petitioners herein have made a certain petition praying that an order be made by your honor limiting the liability of your petitioners and libellants in accordance with the 3d and 4th sections of the act of Congress entitled "An act to limit the liability of ship-owners and for other purposes," passed March 3d, 1851, now embodied in section 4283 to 4285 of the Revised Statutes of the United States in the various statutes in addition thereto and amendatory thereof and tendered said barge "Columbia" and praying that its value be ascertained and tendered into court to be divided under the provision of the statutes aforesaid, and in full satisfaction of the claimants in accordance with said statutes; and your respondent, William Boyce, alleges that during all the times hereinbefore mentioned when said injuries or damage was done as alleged that said barge "Columbia" was in tow of and under the control and in charge of the

steamtug, the "Ocklahama," and that said vessels were one, and had no separate existence and that wherever injury or damage was done or caused, was done and caused by the steamtug, the "Ocklahama," while having the barge "Columbia" in tow and not otherwise.

13. That said libellants and petitioners now claim the benefits of the suits aforesaid by virtue of having tendered the said barge "Columbia" or its value and having wholly failed and refused to tender the steamtug, the "Ocklahama," or its value into this court as required by the statutes before mentioned.

Wherefore your respondent prays that this honorable court
135 will be pleased to set a time and place when due proof of the claim of damage and injury of your respondent, William Boyce, may be taken in this court, and after the same has been ascertained that such proportionate amount as shall be due under and by virtue of the statutes before mentioned may be awarded by your honor to your respondent, William Boyce, with his costs herein incurred; that said libellants and petitioners shall be adjudged at fault in said collision and liable for the loss, destruction, damage and injury resulting therefrom, and that your honor may direct due appraisement to be had for the value of the said barge "Columbia," and also for the said steamtug, the "Ocklahama," in the condition in which they both were immediately after said accident, and upon the ascertainment of such value make an order for the payment therefor by the libellants and petitioners into this court whenever the same shall be ordered, and such other and further and different relief as to this honorable court may seem meet.

CHAS. F. LORD,
*Proctor for Respondent.*

STATE OF OREGON,
*County of Multnomah,* } ss:

I, William Boyce, being first duly sworn, depose and say that I am the respondent in the above-entitled answer; and that the foregoing answer and cross-libel is true as I verily believe.

WILLIAM BOYCE.

Subscribed and sworn to before me this 18th day of May, 1893.
[SEAL.]
CHAS. F. LORD,
*Notary Public for Oregon.*

136 STATE OF OREGON,
*County of Multnomah,* } ss:

Due service of the within amended answer is hereby accepted, in Multnomah county, Oregon, this 24th day of May, A. D. 1893, by receiving a copy thereof duly certified to as such by Chas. F. Lord, attorney for respondent.

W. W. COTTON,
*Attorney for Libellants and Petitioners,*
*The O. R. & N. Co. and O. S. L. & U. N. R. R. Co.*

(Endorsed:) Filed May 25, 1893. R. B. Lamson, clerk.

And afterwards, to wit, on the 20th day of June, 1893, there was duly filed in said court exceptions to second amended answer of Wm. Boyce in words and figures as follows, to wit:

In the District Court of the United States for the District of Oregon.
In Admiralty.

The Barge "Columbia;" Oregon Railway & Navigation Company and The Oregon Short Line & Utah Northern Railway Company, Libellants and Petitioners.

The exceptions of the libellants and petitioners and each of them to the second amended answer of William Boyce, respondent in this cause, allege that said answer is informal and insufficient as follows:

137 First exception. For that the allegations in the said amended answer commencing with the word "and" in the latter part of line 4, page 2, to and including the word "seaworthy" in line 8, page 2, are irrelevant and impertinent and ought to be expunged.

Second exception. For that the allegations in the said amended answer commencing with the word "but" in line 10, page 2, to and including the word "Oregon" in line 13, page 2, are irrelevant and impertinent and ought to be expunged.

Third exception. For that the allegations of the said amended answer commencing with the word "but," line 11, page 4, to and including the word "otherwise" in line 16, page 4, are irrelevant and impertinent and ought to be expunged.

Fourth exception. For that the allegations in the said amended answer commencing with the word "that" in line 25, page 7, to and including the word "libellants" in line 3, page 8, are scandalous, immaterial and impertinent and ought to be expunged.

Fifth exception. For that the allegations in the said amended answer contained in the fourth paragraph thereof on page 8 are immaterial and impertinent and ought to be expunged.

Sixth exception. For that the allegations contained in the said amended answer commencing with the word "and," line 26, page 9, to and including the word "aforesaid," line 27, page 9, are immaterial and impertinent and ought to be expunged.

Seventh exception. For that the allegations contained in
138 the said amended answer commencing with the word "but," line 29, page 9, to and including the word "barge," line 4, page 10, are immaterial and impertinent and ought to be expunged.

Eighth exception. The libellants and petitioners and each of them except to the said amended answer, and each and every part thereof, for the reason that the said amended answer and no part thereof, alleges or states facts showing or tending to show that the alleged injury to the said William Boyce was done, occasioned or incurred by any act of negligence on the part of the libellants or petitioners, or either of them, or with the privity or knowledge of such libellants or petitioners, or either of them, and for the further reason that no facts are stated in the said amended answer or any part of

said answer constituting any ground why the said libellants and petitioners, and each of them, should not be entitled to limit their liability to the appraised value of the said barge "Columbia," as prayed for in the libel and petition herein on account of any alleged injury received by the said William Boyce by reason of the destruction of the said barge as stated in the libel and petition filed herein.

In all of which particulars the said libellants and petitioners humbly insist that the respondent's said amended answer is imperfect, irrelevant, impertinent and scandalous.

Wherefore the libellants and petitioners, and each of them, except thereto and humbly pray that the impertinence and scandal of the said amended answer, excepted to as aforesaid, may be expunged with costs, and that the libellants and petitioners be entitled
139 to the relief sought and may be entitled to the limitation of liability to the extent of the appraised value of the said barge "Columbia" as prayed for in the said libel and petition filed herein.

W. W. COTTON AND
ZERA SNOW,
*Proctors for Libellants and Petitioners.*

Due service of the within exceptions by certified copy as prescribed by law is hereby admitted at Portland, Or., this 17th day of June, 1893.

CHAS. F. LORD,
*Attorney for Wm. Boyce.*

(Endorsed:) Filed June 20, 1893. R. B. Lamson, clerk.

And afterwards, to wit: on Wednesday, the 21st day of June, 1893, the same being the 86th judicial day of the regular March term of said court—present, the Honorable Charles B. Bellinger, United States district judge, presiding—the following proceedings were had in said case, to wit:

In the District Court of the United States for the District of Oregon.

The Barge "Columbia:" Libel and Petition of the Oregon Railway & Navigation Company *et al.* No. 3163.

June 21, 1893.

Now, at this day, this cause comes on to be heard upon the exceptions to the answer of the respondent William Boyce, and was argued by Mr. W. W. Cotton, of counsel for the libellants,
140 and by Mr. Charles F. Lord, of counsel for said respondent, on consideration whereof, it is ordered and adjudged that said exceptions be, and they are hereby sustained, and that said respondent be allowed to file an amended answer herein.

And afterwards, to wit: on Wednesday, the 28th day of June, 1893, the same being the 92d judicial day of the regular March term of said court—present, the Honorable Charles B. Bellinger, United States district judge, presiding—the following proceedings were had in said case, to wit:

In the District Court of the United States for the District of Oregon.

The Barge "Columbia;" Libel and Petition of the Oregon Railway and Navigation Company *et al.* No. 3163.

Now at this day this cause comes on to be heard upon the exceptions of the libellants to the answers of the respondents Sven Anderson, administrator, Malvina Short, administratrix, and Anna C. Larson, said libellants appearing by Mr. W. W. Cotton of counsel, and said respondents by Mr. E. B. Watson of counsel, and said libellants consenting thereto, it is ordered and adjudged that said exceptions be and the same are hereby denied.

And afterwards, to wit, on the 17th day of August, 1893, there was duly filed in said court an answer and cross-libel of William Boyce in words and figures as follows, to wit:

141 In the District Court of the United States for the District of Oregon. In Admiralty.

The Barge "Columbia;" the Steamtug "Ocklahama;" Oregon Railway & Navigation Company and The Oregon Short Line & Utah Northern Railway Company, Libellants and Petitioners.

*Answer and Cross-libel.*

To the Honorable C. B. Bellinger, judge of the district court of the United States for the district of Oregon:

William Boyce exhibits his amended answer to the libel and petition of the Oregon Railway & Navigation Company, and the Oregon Short Line & Utah Northern Railway Company, owners of the barge "Columbia" and the steamtug "Ocklahama," answering said libel and petition separately, and also to serve by way of libel at his suit against the steamtug the "Ocklahama," mentioned in the original libel and petition, whereof William Boyce was lately seaman, and whereof Marshal B. Short was lately master, her steam-engines, boilers, machinery, tackle, apparel and furniture, and also against all persons intervening for their interest therein in a cause of damages or personal injuries by collision, civil and maritime, alleges as follows:

I.

Admits that article first of said libel and petition is true.

142 II.

Admits that article second of said libel and petition is true.

III.

Admits that on or about the 21st day of October, A. D. 1892, the barge "Columbia" in charge of the steamtug "Ocklahama," left Portland, Oregon, having on board a cargo of wheat to be trans-

ferred by said barge and tug from Portland, Oregon, to Astoria, Oregon; denies that said barge "Columbia" was seaworthy or in good order or condition, or that said cargo of wheat was properly loaded therein, but your respondent alleges the truth to be that said barge or lighter was very unseaworthy, and negligently overloaded; your respondent denies that all went well with said barge in tow as aforesaid until the night of the 21st day of October, A. D. 1892, when it reached Astoria, Oregon; admits that said barge intended to tie up alongside the dock of the Oregon Railway & Navigation Company. Admits that a float or pontoon substantially as alleged in said libel and petition was lying in the water in front of said dock for the purpose of preventing ships from chafing against the timbers of said dock. Denies that by reason of the darkness of the night rendered it impossible for the pilot or captain in charge of the tugboat "Ocklahama," the steamboat towing the said barge, to see said float or pontoon. Denies that said barge or lighter in tow as aforesaid ran against said float or pontoon. But alleges the facts to be that said barge being lashed to the side of the steamtug "Ocklahama" as aforesaid and under its control was under such
143 headway and high rate of speed, not slowing up as they approached the dock aforesaid; that said steamtug "Ocklahama" ran the bow of said barge under the wharf or dock striking the same, cutting off several of the spiles and the anchor was thrust through the side of said barge. Admits that said barge was taken into more shallow water by said steamtug and by order of the master or captain thereof in charge of said barge and tow. Admits that said pumps were used. Admits that the men in charge of said steamtug and barge undertook to stop the leakage in said barge by building a bulkhead with sacks of wheat and alleges that your respondent who was deck hand on board the steamtug, the "Ocklahama," by orders of his superior officers, went on board and into the hold of said barge to assist in building said bulkhead. Admits that in order to construct said bulkhead it was necessary to go into the hold of said barge. Admits that said Marshal Short, master and captain, Gus Peterson and your respondent went into the hold of said barge for the purpose of building said bulkhead. Admits that the tide was ebbing at the time the said bulkhead was being so constructed. As to whether or not said barge touched the ground, your respondent has not sufficient knowledge to form a belief. As to whether or not an examination was therein made by the men in charge of said steamtug and barge as to the condition and position of said barge, or that such men thereupon concluded to continue with the work of stopping the said leak or that they believed that said barge would sink into the mud and re-
144 main upright, your respondent has not sufficient knowledge to form a belief. Admits that said barge suddenly listed to one side and away from said dock and toward said steamtug and partially turned over and sank. Admits that said Marshal Short, Gus Peterson and your respondent undertook to escape from the hold of said barge and that they were caught by the falling cargo and that said Short and Peterson were crushed and killed.

Admits that said barge was subject to a severe strain and that its house was carried away and its hull injured, but alleges that any damage or injury which may have or did occur was caused wholly by the negligent manner in which said steamtug, the "Ocklahama," ran said barge into the dock and not *and* in the careless manner in which said barge was overloaded or otherwise. And your respondent alleges the facts to be that while he was in the hold of said barge as ordered by the captain or master of the "Ocklahama" in building the bulkhead before mentioned and when said barge listed and started to turn over, your respondent undertook to escape from the hold of said barge and was greatly injured by the falling of said wheat and was thrown about and bruised and injured and suffered great bodily pain. Admits that your respondent, William Boyce, now claims to have been thrown down and injured as a result of the listing of said barge and the collision caused by said steamtug in running said barge into the dock as aforesaid. Denies that said accident happened,— all the losses, damage or injury and destruction above set forth were occasioned, done or occurred without the fault, privity or knowledge of the petitioners and libellants herein,

145 The Oregon Railway & Navigation Company, and The Oregon Short Line & Utah Northern Railway Company, but alleges the facts to be that the negligent management of the steamtug, the "Ocklahama," owned and operated by said libellants and petitioners herein in running said barge "Columbia" into the dock as aforesaid were the cause of said losses, damage and injury and destruction and not otherwise. Denies that the said losses, damage, injury or destruction as described in said libel and petition, or any loss, damage, injury or destruction in this behalf were due solely or at all to the perils of the sea, but only as before alleged. Your respondent, William Boyce, admits that on or about the 15th day of November, A. D. 1892, he commenced an action against the libellants and petitioners herein to recover damages in the sum of $15,000 for his injuries so received as alleged.

V.

As to whether or not the men on board the said barge "Columbia" were officers, agents, or employees of the Oregon Railway & Navigation Company, your respondent has not sufficient information to form a belief. Denies that the injury to said wheat or to your respondent occurred by reason of any negligence on the part of either of them, the petitioners or libellants herein or of their agents or servants. Denies that said loss or injury as above alleged was caused solely or at all by a peril over which your petitioners or libellants herein, or either of them, had no control, or that the injury should have been prevented by the exercise of any

146 care on the part of the petitioners, or either of them, their officers, agents or employees, but your respondent alleges the facts to be that all of said losses, injury or damage to your respondent did occur by reason of the fault and negligence of said petitioners and libellants herein, and both of them, their servants and

employees, and that by the exercise of reasonable diligence and care upon the part of said libellants and petitioners, and both of them and their servants, agents and employees, it would never have occurred and was caused wholly and solely by the want of care upon their part. Denies that your respondent well knew the danger connected with working in the hold of the said barge, or that said danger was one of or any of the risks of his employment. Denies that the same was assumed voluntarily, or that your respondent had a full or any knowledge of the danger connected therewith, but alleges the facts to be that your respondent was employed as deck hand upon the said steam tugboat, the "Ocklahama," and was under the command and subject to the control of Marshal Short, its captain and master, and that he was ordered as aforesaid to go to and upon said barge and assist in building the bulkhead. That he did not know the danger connected with working in the hold of said barge, that as deck hand upon the said steamtug having said barge in tow, the risks and danger incident to his employment were only those ordinarily connected with the handling of said steamtug and its tow. Denies that the injuries resulting to your respondent or to the estate of Marshal Short or Gus Peterson were not caused by any negligence or lack of care or skill on the part of the petitioners or any of
147 their officers, agents or employees, or were the results solely or at all of the contributory negligence of said Short, Peterson or your respondent, or either of them, in entering into or remaining in the hold of said barge, well or at all knowing the danger connected with the working therein, but alleges the truth to be that the injuries resulting to your respondent, William Boyce, were solely and entirely caused by the negligence and carelessness of your petitioners and libellants herein, and both of them, their officers, agents and employees, in carelessly and negligently operating said steamtug "Ocklahama," and causing said barge to collide with the wharf or dock as aforesaid while in charge of the said tug.

And further answering the libel and petition herein and for a cross-libel your respondent, William Boyce, alleges:

1. That your respondent, William Boyce, is a citizen of the United States and of the State of Oregon.

2. That during all the times hereinafter mentioned the libellants and petitioners herein were corporations as hereinbefore set forth and were common carriers of passengers and freight for hire within the State of Oregon and were the owners of and engaged in running and operating the steamtug "Ocklahama" as a tugboat and the barge "Columbia" as a barge or lighter in towing vessels and barges and carrying freight between Portland, Oregon, to and upon the Columbia and Willamette rivers to Astoria, Oregon, and that said steamtug "Ocklahama" is now within the district of Oregon.

148 3. That on or about the — day of ——, A. D. 1892, your respondent shipped on board said steamtug the "Ocklahama" as seaman or deck hand during her various voyages on and over the rivers to and between the places mentioned above at the monthly wages of $40 with board and lodging by verbal agreement, your

respondent having signed no shipping articles, and that in pursuance of said agreement immediately entered the services of the said steamtug as aforesaid.

4. That on or about the 21st day of October, A. D. 1892, — Portland, Oregon, said steamtug having your respondent on board as aforesaid and lashing to its side a certain barge called the "Columbia," being the same mentioned in the libellants' and petitioners' libel herein, and taking the same in tow proceeded on and over the rivers before mentioned to Astoria, Oregon.

5. That said barge "Columbia" was heavily loaded with wheat in sacks.

6. That *on* or about 12 o'clock of the night of the said 21st day of October, A. D. 1892, said steamtug with the barge in tow as aforesaid arrived opposite Astoria, Oregon, and proceeded to land at the dock or wharf belonging to libellants and petitioners herein.

7. That in approaching said dock or wharf the master or captain or person in charge of said vessel did not use due care or caution, but said vessel having said barge in tow was so improperly and unskillfully managed and navigated in the particulars above
149 mentioned that she was driven upon and into said wharf or dock and thereby drove the bow of the barge "Columbia" with such force and under such headway that it was impossible to stop said tugboat or tow, and the barge "Columbia" was run under the wharf or dock with great force and under such headway and against the spiles, whereby said spiles were broken and one fluke of the anchor hanging over the side was forced through the bottom of said barge, making a hole therein and letting the water into the hold thereof.

8. That thereafter said steamtug towed said barge into a slip and into more shallow water to the rear of said dock and tied one side to said dock, the other side being still attached to said steamtug "Ocklahama."

9. That while said steamtug and barge were under the full authority, charge and control of Marshal B. Short, master and captain as aforesaid, your respondent, acting in obedience to the orders of the said master or captain went from the deck of the "Ocklahama" to and upon the said barge and into the hold thereof to assist in repairing the leak before mentioned and being in the performance of his duty and in obedience to the orders and directions of the said master as aforesaid and without any want of due care upon his part, but solely owing to the negligent and careless and unskillful manner in which said steamtug and barge were navigated in the particulars above mentioned whereby said barge became much injured and leaky, and while your respondent was still in the hold of said barge in discharge of his duty as aforesaid, said barge turned to one side, causing the said load of wheat to move and shift,
150 whereby a large quantity of water came into the hold and said deck was broken in.

10. That as said barge was sinking, your respondent, in endeavoring to save his own life, undertook to escape from the hold of said barge whereby he was greatly injured by the falling sacks of wheat,

the cargo of said barge, and was thrown about and bruised and injured and suffered great bodily pain, and his right arm was broken just above the elbow and the muscles detached from the bones in such a manner as to leave his said right arm weak, sore and disabled, and he is informed, and therefore believes, that his said right arm will never become strong and well, and its usefulness to assist him in making a livelihood is at an end, and it was by the labor of his arms and hands that he gained a living.

11. That during all the times respondent was on board said steamtug, and during the time he was assisting in stopping the leak in the hold of said barge, he well and faithfully performed his duty as such seaman and deck hand and was obedient and did obey all lawful commands of the said master or captain or other officers of said steamtug.

12. That by reason of the unskillful and negligent management of said steamtug "Ocklahama" as aforesaid, your respondent became sick, sore, lame and disabled, and suffered great bodily pain and mental anguish, and was confined to his bed for a long period of time and to the St. Vincent's hospital from the 23d day of October, A. D. 1892, to the 27th day of December, A. D. 1892, and since
151 leaving said hospital your respondent has been sick, sore and disabled and incapacitated from earning his own living, and has lost all the profits of his labor from the 22d day of October, A. D. 1892, to wit, the sum of $40 per month and his board and lodging, and has become permanently injured and incapacitated from following his usual occupation of deck hand or seaman or from earning his own living by his arms to his damage in the sum of fifteen thousand ($15,000) dollars.

13. That your libellants and petitioners herein have made a certain petition praying that an order be made by your honor limiting the liability of your petitioners and libellants in accordance with the third and fourth sections of the act of Congress entitled "An act to limit the liability of ship-owners and for other purposes," passed March 3, 1851, now embodied in section- 4283 and 4285 of the Revised Statutes of the United States in the various statutes in addition thereto and amendatory thereof and tendered said barge "Columbia" or its value in this court to be divided under the provision of the statutes aforesaid and in full satisfaction of the claimants in accordance with said statutes. And your respondent William Boyce alleges that during all the times hereinbefore mentioned when said injuries or damage was done as alleged that said barge "Columbia" was in tow of and under the control and in charge of the steamtug the "Ocklahama," and that said barge had no locomotive power of its own, either sail or steam or hand power, and was lashed securely to the side of said steamtug "Ocklahama," and
navigated by it, and had no separate existence, and that
152 whenever injury or damage was done or caused it was done and caused by the steamtug "Ocklahama" while having the said barge in tow and not otherwise.

14. That said libellants and petitioners now claim the benefit of the statutes aforesaid by virtue of having tendered the said barge

"Columbia" or its value, but have wholly failed and refused to tender the steamtug "Ocklahama" or its value in this court as required by the statutes before mentioned.

15. That all and singular the premises are true and within the admiralty and maritime jurisdiction of the United States and of this honorable court.

Wherefore your respondent prays this honorable court that process in due form of law according to the course of courts of admiralty and of this honorable court in cases of admiralty and maritime jurisdiction may issue against the said steamtug, her engines, machinery, tackle, apparel and furniture and that all persons claiming any right, title or interest may be cited to appear and answer upon oath all the matters aforesaid; or that an order may be made by your honor commanding the libellants and petitioners herein to tender the said steamtug the "Ocklahama" or its value into this court in accordance with the statutes limiting the liability of shipowners and embodied in section 4283 to 4285 in Revised Statutes of the United States; and that your honor will be pleased to set a time and place when due proof of the claim of damage and injury of your respondent, William Boyce, may be taken in this
153 court and after the same has been ascertained that such proportionate amount — shall be due under and by virtue of the statutes before mentioned, may be awarded by your honor to your respondent, William Boyce, with his costs and disbursements herein incurred; that said libellants and petitioners shall be adjudged at fault in said collision and liable for the loss, destruction, damage and injury resulting therefrom and that your honor may direct due appraisement to be had of the said barge "Columbia," and also for the value of said steamtug, the "Ocklahama," in the condition in which they both were immediately after said accident, and upon the ascertainment of such value make and order for the payment thereof by the libellants and petitioners into this court and that your honor will be pleased to decree the payment of the damages, to wit, the sum of fifteen thousand ($15,000) dollars, and the wages at the rate of forty ($40) dollars per month his board first and such other and further and different relief in the premises as in law and justice which to this honorable court may seem meet.

CHAS. F. LORD,
*Proctor for Respondent.*

STATE OF OREGON, } ss:
*County of Multnomah,* }

I, William Boyce, being first duly sworn, depose and say that I am the respondent in the above-entitled cross-libel, and that the foregoing libel is true, as I verily believe.

WILLIAM BOYCE.

154 Subscribed and sworn to before me this 26th day of June, A. D. 1893.

[SEAL.]

CHAS. F. LORD,
*Notary Public for Oregon.*

Due service of the within answer and cross-libel is hereby acknowledged.

W. W. COTTON,
*Proctor for O. R. & N. Co. and O. S. L. & U. N. R'y Co.*

(Endorsed:) Filed Aug. 17, 1893. R. B. Lamson, clerk.

And afterwards, to wit, on the 17th day of August, 1893, there was duly filed in said court a stipulation for costs of William Boyce, in words and figures as follows, to wit:

In the District Court of the United States for the District of Oregon.

WILLIAM BOYCE
*vs.*
STEAMSHIP "OCKLAHAMA."

Whereas, a libel was filed in this court on —— —, 18—, by William Boyce against the steamship "Ocklahama," her tackle, apparel and furniture, for the reasons and causes in said libel mentioned, and praying that the same may be condemned and sold, to answer the prayer of said libellant, and the said libellant and H. Meyer, surety, the parties hereto, hereby consenting and agreeing, that in case of default or contumacy on the part of the libellant or his surety, execution may issue against their goods, chattels and lands,
155 for the sum of two hundred dollars. Now, therefore, it is hereby stipulated and agreed, for the benefit of whom it may concern, that the stipulators undersigned shall be and are bound in the sum of two hundred and fifty dollars, conditioned that the libellant above named shall pay all such costs as shall be awarded against William Boyce by this court, or in case of appeal, by the appellate court.

WILLIAM BOYCE.
H. MEYER.

Taken and acknowledged before me.

T. W. BLEICK,
*Notary Public for Oregon.*

DISTRICT OF OREGON, *ss:*

I, H. Meyer, of Portland, being duly sworn, depose and say, each for himself, that he resides in the district of Oregon, and that he is a householder in said district, and is worth the sum of four hundred dollars over and above all his just debts and libilities.

H. MEYER.

Subscribed and sworn to before me this 4th day of Aug., 1893.
[SEAL.]
T. W. BLEICK,
*Notary Public for Oregon.*

(Endorsed:) Filed Aug. 17, 1893. R. B. Lamson, clerk.

And afterwards, to wit, on the 25th day of August, 1893, there was duly filed in said court an answer and exception to cross-libel of William Boyce, in words and figures as follows, to wit:

156 In the District Court of the United States for the District of Oregon. In Admiralty.

The Barge "Columbia;" The Oregon Railway & Navigation Company and The Oregon Short Line & Utah Northern Railway Company, Libellants and Petitioners.

To the Honorable C. B. Bellinger, judge of the district court of the United States for the district of Oregon:

Answer and exceptions of the Oregon Railway & Navigation Company and of the Oregon Short Line & Utah Northern Railway Company to the cross-libel of William Boyce in the matter of the limitation of liability for the loss or destruction of the barge "Columbia," showeth:

That said Oregon Railway & Navigation Company and the said Oregon Short Line & Utah Northern Railway Company except to that portion of the answer of the said William Boyce, termed a "cross-libel," for the reason that the filing of the said cross-libel and the commencement of an independent proceeding, was contrary to the rules and practice in such cases made and provided by the United States Supreme Court, and particularly by rule 56 of the rules of practice in admiralty adopted by the said court, and for the reason that the matters and things undertaken to be set up in the

157 cross-libel should be established and determined in a proceeding instituted by the said Oregeon Railway & Navigation Company and the said Oregon Short Line & Utah Northern Railway Company to limit the liability of the said companies, and each of them, for the loss, damage and injury done by the destruction of the barge "Columbia."

In answer to the said cross-libel the said Oregon Railway & Navigation Company and the said Oregon Short Line & Utah Northern Railway Company allege:

First. In answer to the fifth article your petitioners and respondents deny that the said barge "Columbia" was heavily loaded with wheat in sacks, or that the said barge was loaded beyond her carrying capacity.

Second. Your petitioners and respondents deny each and every of the allegations contained in the seventh article of the said cross-libel, and allege the facts to be as stated in the libel and petition of your petitioners filed herein.

Third. In answer to the eighth article of the said cross-libel, your petitioners and respondents admit that the said barge was taken into a slip and in more shallow water to the rear of said dock, and that the said barge was then made fast to the said dock, and deny that the other side was still attached to the steamtug "Ocklahama," or that the said "Ocklahama" was in any way connected with the said barge.

Fourth. In answer to the ninth article of the said cross-libel, the libellants and petitioners deny each and every of the allegations contained therein and state that the same is wholly untrue.

158 Fifth. Your petitioners and respondents deny that owing to the manner in which the said steamtug and barge were navigated, that the said barge became much or at all injured or leaky, and deny that there was any negligence or carelessness of any kind whatsoever in the manner in which the said steamtug was navigated, and states and alleges that the facts are as stated in the libel and petition of your respondents filed herein.

Sixth. In answer to the tenth article of the said cross-libel, your petitioners and respondents admit that the said William Boyce undertook to escape from the hold of the said barge, but deny that he was greatly or at all injured by falling sacks of wheat, or was thrown about or bruised or injured or suffered great or any bodily pain, or any pain of any kind whatsoever, and deny that either of his arms were broken in any manner whatsoever, or that the muscles thereof were detached in any manner whatsoever, or that either of his arms thereby became weak, sore or disabled, or that the same will never become strong or well, or that its usefulness was in any manner whatsoever impaired.

Seventh. In answer to the eleventh paragraph of the said cross-libel your petitioners and respondents deny that the said William Boyce well or faithfully performed his duty as such seaman or deck hand, but that he undertook to perform his said duty in a negligent, careless and unskillful manner and voluntarily assumed the risks of injury by entering the hold of the said barge well

159 knowing that it was dangerous for him so to do, and that as a result of his own negligence and carelessness as aforesaid and of his voluntary assumption of the risk of the danger connected with work in the said hold of the said barge, it became necessary for the said William Boyce to undertake to escape therefrom and that his said injuries resulted from his own negligence and carelessness as a result of working in the hold of the said barge, and not otherwise.

Eighth. In answer to the twelfth paragraph of the cross-libel, your petitioners and respondents deny that by reason of any unskillful or negligent management of the said steamtug "Ocklahama," as aforesaid, or by reason of any management of the said steamtug "Ocklahama," or by reason of the said steamtug "Ocklahama," in any manner whatsoever, the said William Boyce became sick, sore, lame or disabled or suffered any pain or anguish, or was confined to his bed for any period of time whatsoever or was confined to said St. Vincent's hospital for any time whatsoever or was injured in any manner whatsoever or that the said William Boyce became sick, sore or disabled or incapacitated from earning his own living or has lost any profits of his labor for any period of time whatsoever or has become permanently or at all injured or incapacitated from following the occupation of deck hand or seaman, or from earning his own living in any manner whatsoever, or has

become injured or incapacitated in any manner whatsoever or has been damaged in any sum whatsoever.

Ninth. In answer to the thirteenth paragraph of the said
160 cross-libel your petitioners and respondents deny that during the times when the said alleged injuries or damage to the said William Boyce were done as alleged in the said cross-libel, the said barge "Columbia" was in the tow of, or under the control or in the charge of the steamtug "Ocklahama," or that the said barge was lashed in any manner whatsoever to the side of the steamtug "Ocklahama," or was navigated by it, that it had no existence separate from the said steamtug "Ocklahama," and your petitioners and respondents deny that any injury or damage whatsoever was done or caused by the said steamtug "Ocklahama" while having the said barge in tow.

Tenth. Your petitioners and respondents allege that at the times of the alleged injuries to the said William Boyce, and for a considerable period of time prior thereto, the said barge "Columbia" was securely and safely tied to the dock at Astoria, and was under the charge, control and direction of her own officers and men and was not in any manner whatsoever under the charge and control of the said steamtug "Ocklahama" or being navigated by it, and allege that the said steamtug "Ocklahama" was in no manner responsible for any of the injuries alleged to have been received by said William Boyce as alleged in the said cross-libel or otherwise.

Respondents and petitioners allege that the injury and damage to the said barge "Columbia" and her cargo and the overturning and destruction of the said barge was produced and caused in the manner alleged in the libel and petition of your petitioners and respondents and not otherwise.

161 Wherefore the petitioners and respondents pray that the said cross-libel of the said William Boyce may be dismissed and that your libellants and petitioners may have the relief prayed for in their libel and petition filed herein.

W. W. COTTON,
*Proctor for the Oregon Railway & Navigation Company and Oregon Short Line & Utah Northern Railway Company.*

STATE OF OREGON, }
*County of Multnomah,* } *ss:*

I, W. W. Cotton, being first duly sworn, depose and say that I am the secretary of the Oregon Railway & Navigation Company, one of the parties to the above-entitled proceeding and that the foregoing answer is true as I verily believe.

W. W. COTTON.

Subscribed and sworn to before me this 24th day of August, 1893.

[SEAL.]

J. M. LONG,
*Notary Public for Oregon.*

Due service of the within by certified copy as prescribed by law is hereby admitted this — day of ——, 18—.

CHAS. F. LORD,
*Attorney for William Boyce.*

(Endorsed:) Filed Aug. 25, 1893. R. B. Lamson, clerk.

And afterwards, to wit, on the 5th day of August, 1893, there was duly filed in said court a stipulation in words and figures as follows, to wit:

162 In the District Court of the United States for the District of Oregon.

The Barge "Columbia;" Oregon Railway & Navigation Company and The Oregon Short Line & Utah Northern Railway Company, Libellants and Petitioners.

It is hereby stipulated by and between the proctors for the libellants and petitioners and proctor for William Boyce that all the allegations of new or affirmative matter in the answer of said William Boyce shall be considered denied without any reply being filed thereto.

CHAS. F. LORD,
*Proctor for William Boyce.*
W. W. COTTON,
*Proctor for Libellants and Petitioners.*

(Endorsed:) Filed Aug. 25, 1893. R. B. Lamson, clerk.

And afterwards, to wit, on the 25th day of August, 1893, there was duly filed in said court a stipulation to amend answer of Balfour, Guthrie & Co. in words and figures as follows, to wit:

163 In the District Court of the United States for the District of Oregon. In Admiralty.

The Barge "Columbia;" Oregon Railway & Navigation Company and The Oregon Short Line & Utah Northern Railway Company, Libellants and Petitioners.

It is hereby stipulated by and between Balfour, Guthrie & Co. and the Oregon Railway & Navigation Company and the Oregon Short Line & Utah Northern Railway Company, by their respective proctors, that the answer of the said Balfour, Guthrie & Co., heretofore filed herein, to the libel of the said Oregon Railway & Navigation Company and Oregon Short Line & Utah Northern Railway Company, may be amended as follows, and that this stipulation shall be considered as such amendment to the said answer, to wit: By inserting between the word "employees," in the thirteenth line of page 7 of said answer, and the word "wherefore," in the fourteenth line of the same page, the following:

"4. The value of said wheat, at the time of its said loss, to wit,

the 21st day of October, 1892, was one dollar and twenty-seven and one-half cents per cental of one hundred pounds, or the total sum of fifteen thousand and one dollars and eighty-five cents.

"By reason of the loss of said wheat, as aforesaid, said
164 ship, the 'Westgate,' was detained at Astoria five days, awaiting the arrival of other wheat to replace that lost as aforesaid, and was thereby prevented from completing her cargo and from clearing for her port of destination and proceeding upon her voyage; and these libellants were thereby delayed five days in obtaining a bill of lading for the cargo of said vessel, and, in consequence, prevented from the sale of exchange drawn against said bill of lading for the same period of time. And these libellants have been further damaged by means of said detention as aforesaid in the sum of one hundred and fifty-six pounds three shillings and four pence, or seven hundred and eighty dollars and eighty-three cents, demurrage of said vessel, and one hundred and eleven dollars and eleven cents interest on the value of said cargo for said period of detention.

"By reason of the loss of said wheat as aforesaid, libellants are further damaged in the sum of one hundred and twenty-five dollars, paid by them as stevedore charges for the loading of said wheat aboard said barge at Portland, Oregon.

"By reason of the facts aforesaid, libellants have been damaged in the full sum of $16,018.79, with interest thereon from the 26th day of October, 1892, at the rate of eight per cent. per annum.

"And these libellants further allege that said libellants or petitioners have not surrendered into court the said steamer 'Oklahama,' nor her appraised value."

165 All the allegations of new matter in said answer shall be considered as denied.

W. W. COTTON,
*Proctor for the Oregon Railway & Navigation Company and the Oregon Short Line & Utah Northern Railway Company.*

WILLIAMS & WOOD,
*Proctors for Balfour, Guthrie & Co.*

(Endorsed:) Filed August 25, 1893. R. B. Lamson, clerk.

And afterwards, to wit, on the 6th day of November, 1893, there was duly filed in said court a stipulation in words and figures as follows, to wit:

In the District Court of the United States for the District of Oregon.

In the Matter of the Limitation of Liability for the Loss and Destruction Caused by the Barge "Columbia."

It is hereby stipulated by and between the proctors for the petitioners and Balfour, Guthrie & Co., that the insurance money paid on the wheat, and referred to in the testimony of W. J. Burns, was

paid to said Balfour, Guthrie & Co. by the insurance company on the 11th day of November, 1892.

C. E. S. WOOD,
*Proctor for B., G. & Co.*
W. W. COTTON,
*Proctor for Libellants and Petitioners.*

166 (Endorsed:) Filed Nov. 6, 1893. R. B. Lamson, clerk.

And afterwards, to wit, on Monday, the 19th day of February, 1894, the same being the 90th judicial day of the regular November term of said court—present, the Honorable Charles B. Bellinger, United States district judge, presiding—the following proceedings were had in said case, to wit:

In the District Court of the United States for the District of Oregon.

The Barge "Columbia;" Oregon Railway & Navigation Company and The Oregon Short Line & Utah Northern Railway Company, Libellants and Petitioners; Malvina Short, Administratrix of the Estate of Marshal B. Short, Deceased; Sven Anderson, Administrator of the Estate of John August Peterson, Deceased; Anna C. Larson, William Boyce, and Balfour, Guthrie & Company, Respondents. No. 3163.

February 19, 1894.

This cause was heard upon the libel and petition of the Oregon Railway & Navigation Company and the Oregon Short Line & Utah Northern Railway Company, the answer and cross-
167 libels filed thereto by the respondents, and the testimony, and was argued by Mr. W. W. Cotton, of counsel for said libellants and petitioners; by Mr. E. B. Watson, of counsel for the respondents Malvina Short, administratrix; Sven Anderson, administrator; and Anna C. Larson, by Mr. Charles F. Lord, of counsel for the respondent William Boyce; and by Mr. C. E. S. Wood, of counsel for the respondents Balfour, Guthrie & Company. On consideration whereof the court finds:

First. That on October 21, 1892, the barge "Columbia," being loaded with 8,898 sacks of wheat on her deck, owned by the respondents, Balfour, Guthrie & Company, was taken in tow by the steamer "Ocklahama" at Portland, Oregon, and by her towed to Astoria, Oregon, said barge and steamer being owned by the petitioners herein.

Second. That said barge and steamer arrived in safety at Astoria during the night of said October 21st, but that in making a landing the stem of said barge struck a floating pontoon, which was kept next the wharf as a fender, with such force as to cause said barge to spring a leak. That said leak was not considered serious or dangerous by those in charge of the said barge, and was not serious or dangerous.

Third. That said barge about a half an hour after striking said pontoon was moved to a position behind said wharf, where she

rested on the bottom of the Columbia river, which was there composed of soft mud, and being listed against the dock was in a safe position.

168 Fourth. That Marshal Short, master of said "Ocklahama," and Gus Peterson, one of the crew of said "Ocklahama," thereupon descended into the hold of said barge for the purpose of building a bulkhead to stop said leak, and at the same time John Ferguson, master of said barge, was assisting in pumping the water out of said barge by means of a siphon, the lower end of which rested in the bottom of said barge on the side away from the dock.

Fifth. That after the said barge had rested in this position against the dock for about an hour and a half and while said Short and Peterson were in the hold of said barge said John Ferguson on his own motion negligently caused the cargo on the deck of said barge to be shifted until said barge was on an even keel and was no longer resting against the dock. At this time and for some time prior thereto the tide in the Columbia river was ebbing.

Sixth. That when said barge came to an even keel she remained in that position for a short time when the tide having ebbed and she having no lateral support said barge keeled over away from said dock, striking her bilge on the bottom of said river with great force, causing the cargo to shift and carry away the deck-house, and a large portion of said cargo slid into said river, and the hull of said barge was broken down by the shock.

Seventh. That said Short and Peterson were unable to escape from the hold of said barge and were drowned, and said William Boyce, who was in the hold of said barge, was injured by being struck by said cargo in attempting to reach the deck of said barge.

169 Eighth. That said barge was seaworthy and was at the time of the voyage in a suitable and proper condition for the purpose for which she was being used; that she was properly manned and was not overloaded, and that the said leak caused by striking the dock was not serious or dangerous; that the position in which she was placed against the side of the dock was a proper and safe position, and that the accident was caused by the negligent shifting of the cargo on said barge by the said Ferguson, and the collapse was due to the exceptional strain to which the timbers were subjected in the unnatural position in which she was placed when thrown upon her side, and that the steamer "Ocklahama" did not in any way cause the said accident.

Ninth. That John Ferguson, the master of the said barge, was a licensed mate upon the Columbia river and there was no negligence on the part of the petitioners or either of them in employing the said John Ferguson; that the said John Ferguson occupied no position with either of the petitioners herein except that of captain of the said barge; that the said accident resulting in the death of Short and Peterson and injuries to Boyce and the loss of the wheat loaded on the said barge occurred without the knowledge or privity of said petitioners or either of them.

Tenth. That the petitioners, and each of them, having caused the said barge "Columbia" to be appraised, and having given a bond duly approved for the payment of the appraised value of the said barge into court, the petitioners, and each of them, are entitled
170 to limit their liability for the loss and damage done and occasioned by the said barge to the sum of one hundred dollars, the same being the appraised value thereof.

It is, therefore, pronounced and decreed that said respondents do have and recover against said petitioners the said sum of one hundred dollars, without costs to either party; that said petitioners do, within ten days from this date, pay said sum into the registry of this court, and that in default thereof, that execution issue against Frank Dekum and H. C. Stratton, stipulations on the bond given by said petitioners for the appraised value of said barge, therefore: and it is further ordered that the clerk of this court distribute said sum as follows: that he pay to said Malvina Short, administratrix, Sven Anderson, administrator, and Anna C. Larson, the sum of $33.33; to William Boyce the sum of $33 33, and to Balfour, Guthrie & Company the sum of $33.33.

(Signed) CHARLES B. BELLINGER, *Judge.*

(Endorsed:) Filed February 19, 1894. R. B. Lamson, clerk.

And afterwards, to wit, on the 19th day of February, 1894, there was duly filed in said court, an opinion by the court in words and figures as follows, to wit:

171 In the District Court of the United States for the District of Oregon.

The Barge "Columbia;" Oregon Railway & Navigation Company and The Oregon Short Line & Utah Northern Railway Company, Libellants and Petitioners; Malvina Short, Administratrix of the Estate of Marshal B. Short, Deceased; Sven Anderson, Administrator of the Estate of John August Peterson, Deceased; Anna C. Larson, William Boyce, and Balfour, Guthrie & Company, Respondents. No. 3163.

February 19, 1894.

BELLINGER, *J.:*

On the 21st day of October, 1892, the barge "Columbia," loaded with 8,898 sacks of wheat belonging to Balfour, Guthrie & Co., was taken in tow at Portland by the steamer "Ocklahama," to be thence taken to Astoria, where such wheat was to be delivered on board the British ship "Westgate" for shipment to England. The barge and steamer both belonged to the libellants, the railway & navigation company and its lessee. The steamer and tow made the trip to Astoria, where they arrived a little before midnight with-
172 out accident; but in making a landing the stem of the barge struck a floating pontoon, which was kept next the wharf as a fender, with such force as to cause the barge to spring a leak.

After examination under direction of the captain of the steamer, and probably a half hour after the accident, the barge was taken behind the dock and alongside of it to a place of greater safety where further examination was made of her injuries and steps were taken to pump the water from her by means of a siphon. When first taken to the inside of the dock the barge was listed towards the dock and was in a comparatively easy position. Captain Short, the captain of the steamer, and some deck hands went into the hold of the barge to stop the leak. Meanwhile Ferguson, the master of the barge, was at work shifting the wheat to get the barge on an even keel, so as to bring the water in the hold underneath the siphon and thus facilitate its operation. As a result of this shifting of cargo, the barge listed away from the dock and, turning over, struck heavily on her side, breaking her timbers at the bilge and causing the collapse. Captain Short and Peterson were caught in the hold of the vessel and killed and a deck hand, William Boyce, was injured.

On the 15th of the following November Boyce begun an action in the circuit court of this State for Multnomah county, against the two railway companies for damages for injuries received in such accident in the sum of $15,000. Thereupon the railway companies filed a libel in this court against Boyce, the administrator of Short and Peterson, and Balfour, Guthrie & Co., to obtain the benefit of the law limiting the liability of owners of vessels to the value
173 of such vessels for loss or damage occasioned without their privity or knowledge.

Balfour, Guthrie & Co., Boyce and the administrators of Short and Peterson, filed their respective answers to the libel. The answer of Balfour, Guthrie & Co. allege that the barge was not sound, staunch or seaworthy at the time she was loaded for the voyage in question; that the cargo of the barge was carelessly, negligently and improperly loaded; that the barge was overloaded; was insufficiently manned and equipped; that her crew were without the necessary skill and experience for the business engaged in, and that all these matters were at the time well known to the owners, their officers, agents and employees. Such answer further alleges that the barge was so negligently and carelessly handled at the time of her landing at Astoria that her bow was stove in, and that in removing her to the inside of the dock the libellants were guilty of negligence and unskillfulness. The answer of Boyce, deck hand on the barge, alleges in effect that the accident was the result of the negligent handling of the tug and tow in making the landing at Astoria. The answers of the administrators of Short and Peterson allege the same matters of negligence alleged in the answer of Balfour, Guthrie & Co., except as to the alleged insufficiency and unskillfulness of the crew of the barge, and except also as to the allegation of negligence in making the landing at Astoria and in moving the barge to the inside of the dock. These answers further allege that the barge was improperly constructed in having a round instead of flat bottom, and that there was negligence in not having provided suit-
174 able pumps and pumping apparatus. The contention is also made on the part of all the cross-libellants that the tug and

tow were in law one vessel, and that to avail themselves of the benefit of the limited liability act, the owners must surrender the tug as well as the barge in satisfaction of the damages complained of.

My conclusions from the evidence are that the barge was seaworthy; that she was properly manned and handled and that the proximate cause of the accident was the negligent shifting of cargo, under the direction of the captain of the barge, Captain Short and a crew of hands being in the hold, while she was lying in a comparatively safe position "right alongside the dock," as witnesses describe it, and listed against it on the shore side. The tide had been ebbing for some time, and the barge was resting upon a bottom of soft mud. In this position there was nothing to have prevented the unloading of her cargo upon the dock. Some two hours had elapsed since the breaking of the stem of the barge in making a landing. The testimony shows that the injury to the barge and the leak were not regarded as serious by those in charge. When one of the crew said to Captain Short as they were working in the hold to stop the leak that the agent Lownsberry looked "kind of scared of this business," the captain answered "There is nothing the matter with this; I have seen a boat up the Willamette river just like this and fixed her."

George Carter, a witness for the respondent, testified on his cross-examination that the shifting of the cargo was most likely what caused the accident.

175 Q. Suppose it had been stated to you, with your experience, that she had been originally listed toward the dock and the wheat put on until she had listed the other way, what would you say?

A. I would say that they were damn fools; that is just what I would say.

Q. And that was very likely the cause of the accident?

A. The loss of the wheat. If they shifted the grain across from the inshore down to the offshore that was what done it, most likely.

Captain Tackaberry, an experienced man, called as a witness by both sides, was present when the accident occurred. He testified that when the boat was keeled over to starboard (towards the dock) he advised the captain of the barge to put out plenty of line and let her lie that way. He further says, "I thought lying up against the dock in the way she was, with plenty of line, would perhaps hold her in her position."

The barge had been repaired shortly before the accident, something over $1,500 were expended in such repairs. A detailed description of such repairs is given by the witness Carsten who superintended the work. He was not restricted by the company as to the cost of such repairs. No question is made as to his competency for the work, and the testimony shows that it was well done. He testifies that he "went over the hull of her two or three times with a hammer and chisel and a small bit," that he examined her "all over," and found her in a very good condition "except her deck frames were bad."

176 There was evidence in the case showing that after the collapse the timbers and planking of the barge were found to be rotted in places. The witness Blagen who examined the wreck found two or three of the knees or crooks in the frame of the barge that were somewhat decayed, the rest were apparently sound. These sound timbers were broken off fifteen or twenty of them, all of the timbers were broken and all were sound but two or three. The collapse was due to the exceptional strain to which the timbers of the barge were subjected in the unnatural position in which she was placed. These timbers were subjected to the lateral strain of five or six hundred tons, the weight of which came from the shifting cargo with the effect of a blow. The witness, Captain Gray, states the reason for the accident in these words: "This collapse was caused by the vessel rolling over and striking this bottom, and the weight of the grain with this momentum smashed the side over; the deck might have been brand new and that would not have affected it." I am satisfied that in the situation in which the barge was placed the collapse would probably have occurred without reference to the condition of the timbers as to soundness and that the timbers which gave way were practically sound.

The leak from the bump in landing was a condition and not a proximate cause of the accident, which resulted as already stated from the negligent action of the barge captain in shifting cargo. The barge does not appear to have been overloaded. She carried her load safely to Astoria and was equal to all the ordinary requirements of such a cargo.

177 The rule that a tug and her tow are in law one vessel is a rule of navigation under 4233 of the Revised Statutes of the United States. That section makes certain regulations for preventing collisions in the navigation of vessels of the navy and of the merchant marine of the United States. Under this section it is held that a tug and her tow are in law one vessel under steam, and are liable as such in cases of collision. But even this rule is not an absolute one. It does not apply where the tug is employed by the owners of the tow as a mere motive power to propel their vessel from point to point under the exclusive control and direction of the master of the tug.—Sturgis *v.* Boyer, 24 How., 110.

The rule does not apply in this case. The tow service of the tug was ended before the proximate cause of the accident in question was set in motion. The barge was alongside of the wharf, listed against it where it was intended she should remain and where she would have remained but for the negligent act of her master in shifting her cargo, a thing with which the tug had and in the nature of things could have nothing to do.

The findings and decree will be in conformity with the views herein expressed.

Mr. W. W. Cotton for the Oregon Railway & Navigation Company and the Oregon Short Line & Utah Northern Railway Company.

Mr. E. B. Watson for Malvina Short, administratrix of the estate of Marshal B. Short, deceased, Sven Anderson, administrator of

the estate of John August Peterson, deceased, and Anna C. Larson.

178 Mr. Charles F. Lord for William Boyce.
Mr. C. E. S. Wood for Balfour, Guthrie & Company.

(Signed) CHARLES B. BELLINGER, *Judge.*

(Endorsed:) Filed Feb. 19, 1894. R. B. Lamson, clerk.

And afterwards, to wit, on Monday, the 26th day of February, 1894, the same being the ninety-sixth judicial day of the regular November term of said court—present, the Honorable Charles B. Bellinger, United States district judge, presiding—the following proceedings were had in said case, to wit:

In the District Court of the United States for the District of Oregon.

The Barge "Columbia;" Oregon Railway & Navigation Company *et al.*, Libellants and Petitioners; William Boyce *et al.*, Respondents. No. 3163.

February 26, 1894.

Now, at this day, this cause comes on to be heard upon the application of the respondent William Boyce to have the decree heretofore entered herein modified so as to allow said respondent to recover in addition to the amount allowed by said decree, wages during the time he was confined and incapacitated on account
179 of the injuries set forth in his answer herein; and it appearing to the court that said respondent was employed by the libellants as one of the crew of the steamer "Ocklahama," and that he in no way contributed to the accident which resulted in the injuries set forth in his answer herein; and it further appearing to the court that said respondent was receiving forty dollars per month as such wages, and that he was incapacitated and confined to the hospital for a period of more than one month by reason of said injuries; it is therefore adjudged and decreed that said decree heretofore entered herein be and the same is hereby so modified as to allow said respondent the sum of forty dollars as wages for one month in addition to the amount allowed by said decree; and that said respondent do recover against said libellants the said sum of forty dollars.

(Signed) CHARLES B. BELLINGER, *Judge.*

(Endorsed:) Filed Feb. 26, 1894. R. B. Lamson, clerk.

And afterwards, to wit, on the 3d day of April, 1894, there was duly filed in said court, a petition for appeal and assignment of errors, in words and figures as follows, to wit:

180 In the District Court of the United States for the District of Oregon. In Admiralty.

The Barge "Columbia;" Oregon Railway & Navigation Company and The Oregon Short Line & Utah Northern Railway Company, Libellants and Petitioners, Respondents; Malvina Short, Administratrix of the Estate of Marshal B. Short, Deceased; Sven Anderson, Administrator of the Estate of John August Peterson, Deceased; Anna C. Larson, William Boyce, and Balfour, Guthrie & Company, Respondents, Appellants.

Malvina Short, administratrix of the estate of Marshal B. Short, deceased, Sven Anderson, administrator of the estate of John August Peterson, and Balfour, Guthrie & Company, hereby appeal from the decree entered in the above-entitled court in the above-entitled cause on the 19th day of February, 1894, and from the whole thereof to the next regular term of the United States circuit court of appeals for the ninth circuit; and said appellants, and each of them, respectfully show to the court and allege as follows:

181 That on the 26th day of November, 1892, the libellants and petitioners herein, The Oregon Railway & Navigation Company and The Oregon Short Line & Utah Northern Railway Company, filed their joint and several libel in the above-entitled court and cause, wherein they alleged substantially as follows:

That the Oregon Railway & Navigation Company, a corporation, was the owner of the barge "Columbia," used and operated on the Columbia and Willamette rivers; that the Oregon Short Line & Utah Northern Railway Company was a corporation engaged in operating steamboats, lighters, barges and other vessels between the cities of Portland and Astoria, Oregon, and was, during the times referred to in said libel, the lessee from the Oregon Railway & Navigation Company aforesaid for a period of ninety-nine years, of said barge "Columbia."

That at the time referred to the last-mentioned corporation had the exclusive possession, control and management of said barge "Columbia."

That on or about the 21st day of October, 1892, the said barge "Columbia" left Portland, Oregon, with a cargo of wheat to be transported to Astoria, Oregon, said wheat to be a part of the cargo of the British ship "Westgate," bound for Liverpool, England.

That said barge "Columbia" was seaworthy and in good order and condition, and that said cargo of wheat was properly loaded thereon, and that all went well with the barge and the cargo until the said barge "Columbia," on the night of the 21st of October, 1892, reached Astoria, Oregon, when she ran against a float

182 or pontoon, while she was approaching the dock of the Oregon Railway & Navigation Company, at which she intended to tie up, which pontoon was fastened alongside the dock for the purpose of preventing ships from chafing against the dock.

That the darkness of the night rendered it impossible for the pilot and captain in charge of the "Ocklahama," a steamboat towing the

said barge, to see the said pontoon, and in attempting to make a landing at said dock the said barge ran against said pontoon with sufficient force to break the stem and forefoot of the said barge, and to start her timbers to such an extent that the said barge commenced leaking.

That said barge was thereupon taken behind said dock and was placed alongside the rear portion thereof and after an examination was made it was found that the barge would probably float if the pumps were used, and thereupon the men in charge of the barge commenced using the pumps and kept the leak under control; that the cargo upon said barge was entirely loaded upon her deck as is customary in vessels of her character; that at the time the pumps were working no part of the cargo of said barge was injured in any manner whatsoever, but that the cargo of said barge was injured in the manner following: The men in charge of said barge undertook to stop the leak in the barge by building a bulkhead and in order to aid in the work of building the said bulkhead three men among others entered the hold of the barge. These men were Marshal Short, William Boyce and Gus Peterson. That the tide at this time was ebbing and while the men were in the hold of the barge, the barge touched ground.

183 That an examination was thereupon made by the men in charge of the barge as to her condition and position and they concluded to continue the work of trying to stop the leak, believing that the barge would sink into the mud and remain upright. That as the tide had continued to fall, the barge suddenly listed to one side away from said dock and partially turned over. That said Marshal Short and said Gus Peterson were caught by the falling cargo of wheat sacks and were crushed and killed. That a large amount of the cargo of said barge was thrown into the water and the barge subjected to such a severe strain that her house was carried away and her hull damaged and that the said William Boyce claimed to have been injured by being thrown down at the time of the listing of the barge.

That said accident happened and the losses, damage, injury and destruction above set forth were occasioned, done and occurred without the fault, privity or knowledge of petitioners and were due solely to the perils of the sea.

And thereupon the said libel proceeds to set up an exemption from liability for said losses, damage, injury and destruction, by reference to an act of Congress entitled "An act to limit the liability of ship-owners, and for other purposes," and asks that all proceedings at law or otherwise, except in this court and cause be enjoined.

Said petition then sets up the facts of the lease between the said Oregon Railway & Navigation Company and the Oregon Short Line & Utah Northern Railway Company, and avers that

184 said cargo of wheat was not being carried, handled or controlled in any manner by the Oregon Railway & Navigation Company, but was carried by the Oregon Short Line & Utah Northern Railway Company.

Said petition further states that the said barge "Columbia" was

in all respects sound, staunch, seaworthy and properly manned; that its said cargo consisted of 8,898 sacks of wheat, carried under a shipping receipt or bill of lading of the tenor following:

"In consideration of the reduced rate at which the articles covered by this receipt are carried it is agreed by the undersigned for and on behalf of the owner of the property that the Oregon Short Line & Utah Northern Railway Company shall not be responsible for any injury or damage to the property described in this receipt not caused by the actual negligence of the said company or its agents."

That said agreement contained in said receipt was signed by the said Balfour, Guthrie & Company; that the injury to said wheat did not occur by reason of any negligence on the part of the petitioners or any of their agents or servants, but was caused solely by a peril over which they had no control.

And said petition further states that the death of said Short and Peterson and the injuries of said Boyce were due entirely to the contributory negligence of said Short, Peterson and Boyce and that each of them in entering and remaining in the hold of said barge, well knew the danger connected with working therein, and said petition concludes with a prayer for the appraisement of the said barge "Columbia," the payment into court of the amount appraised and for the taking of proofs, etc.

185 Subsequently said barge was appraised at one hundred dollars and said amount was paid into court.

Upon the trial and hearing of said cause it was urged by the respondents, Balfour, Guthrie & Co., that the aforesaid bill of lading was a special agreement between the parties thereto that the said O. S. L. & U. N. R'y Co. would be responsible for all actual negligence of its agents.

That thereafter on the 22d day of December, 1892, the appellants herein, Balfour, Guthrie & Co., filed their answer to said libel wherein and whereby they alleged substantially as follows:

They admit articles one, two and three of said libel, but deny that said barge "Columbia" was seaworthy or in good order or condition or that said cargo of wheat was properly loaded thereon, and allege that said barge was unseaworthy, in bad order and condition and that these facts were well known to the owners of said barge, their officers, agents and employees; that said wheat was carelessly, negligently and improperly loaded on said barge; that said barge was very much overloaded beyond her carrying capacity, and was improperly and insufficiently manned and equipped.

They deny that all went well with said barge or her cargo until the night of October 21, 1892, when said barge reached Astoria, Oregon, and said collision occurred, and deny any knowledge of the nature, character or construction of said float or pontoon or the use to which the same was put.

Deny that the darkness of the night rendered it impossible for the pilot and captain in charge of the "Ocklahama" to see
186 the barge, but admit that said barge ran against some obstacle with sufficient force to break the stem and forefoot of

said barge and to start her timbers to such an extent that the said barge commenced leaking.

Respondents then allege that said towboat "Ocklahama" and the said barge were each of them respectively so negligently and carelessly managed that said barge at said time had her bow stove in and commenced to fill rapidly, and that the libellants and petitioners in removing said barge were guilty of carelessness, negligence and unskillfulness.

Admit that the said barge was taken behind the said dock and placed alongside the rear portion thereof: and admit that for some purpose unknown to them the said Marshal Short and one other man, whose name and occupation was unknown to respondents, entered the hold of the said barge; and admit that said Short was captain of the "Ocklahama;" and admit that the tide was ebbing at the time said accident occurred. Admit that the tide continued to fall, that the barge listed to one side and partially turned over, but deny that it did so suddenly.

Admit that said Marshal Short and another man were killed by the falling of the cargo of the barge, consisting of wheat in sacks, piled in tiers upon the deck of the barge; and admit that a large amount of the said cargo was thrown into the water; but deny that the barge was subjected to any severe strain.

Admit that her house was carried away and her hull damaged, but allege that it is nothing unusual for barges such as the said barge "Columbia" to take the ground when loaded, and
187 that the strain to which the said barge was thereby at said time subjected was not a severe or unusual strain, and would not have injured said barge in any respect had she been sound, staunch and seaworthy.

Deny that the said accident happened, or that the losses, damage, injury or destruction, as set forth in the said libel and petition, were occasioned or done or occurred without the fault, privity or knowledge of said libellants and petitioners, or either of them; but on the contrary, allege the facts to be that the unseaworthiness and old and rotten condition of said barge, and the overloading of the same, and the carelessness, negligence and lack of skill and competency on the part of the crew of said barge and the captain and crew of the said "Ocklahama," were each and all of them the causes of said loss, damage, injury or destructions, and were each and all of them with the full knowledge of the libellants and petitioners and each of them.

Deny that said loss, damage, injury or destruction, as described in said libel and petition, or any loss, damage, injury or destruction in this behalf, were due solely or at all to the perils of the sea.

Deny that none of the men on board of the said barge were officers, agents or employees of the said Oregon Railway & Navigation Company. Deny that the said wheat being carried for them was not being carried, handled or controlled in any manner by the said Oregon Railway & Navigation Company.

Deny that said barge was in all or any respects sound, staunch,

seaworthy, or properly manned, equipped or provided for the
188 voyage in which she was engaged, or was under the charge or management of proper or suitable officers.

Deny that the injury to the said wheat did not occur by reason of any negligence on the part of either of the said libellants and petitioners or their agents or servants, and deny that said loss was caused solely or at all by a peril over which libellants and petitioners, or either of them, had no control; and deny that said injury could not have been prevented by the exercise of care on the part of said libellants and petitioners, or their officers, agents or employees.

Admit that said Marshal Short, William Boyce and Gus Peterson, and each of them, well knew the danger connected with working in the hold of said barge; but deny that the injuries resulting to the said William Boyce and to the estate of the said Marshal Short and the said Gus Peterson were not caused by any negligence or lack of care or skill on the part of the said petitioners or any of their officers, agents or employees.

Said answer then prays that the order for the appraisement of said barge and that monition issue, be vacated and set aside and that they be decreed to recover from said libellants and petitioners the full amount of their damages, together with their costs and disbursements.

That thereafter the said Melvina Short, administratrix of the estate of Marshal B. Short, and Sven Anderson, administrator of the estate of John August Peterson, mentioned in said libel as Gus Peterson, separately filed their respective answers to said libel, admitting the deaths of said Marshal B. Short and John
189 August Peterson at the time and place stated in said libel, but averring that said Short was crushed and smothered by the falling sacks of wheat in one of the hatchways in the deck of said barge and that said Peterson was drowned in the hold thereof. And each of said respondents denying in her and his said respective answer that said barge was seaworthy or properly loaded; averred that said barge "Columbia" was for a long time prior to and on said date, old, worn, unsound, decayed, and utterly unseaworthy and leaky and without suitable pumps and pumping apparatus; and that libellants well knew the same and with such knowledge carelessly and negligently *and* had said barge in its possession, employment and use in transporting freight on the Willamette and Columbia rivers from its docks at Portland to its docks at Astoria, in the State of Oregon; and on October 19, 1892, with such knowledge carelessly and negligently loaded said barge at its docks at Portland, Oregon, with said cargo of wheat containing about six hundred tons, which was far beyond the capacity of said barge to carry with safety in its then condition, and that said cargo of wheat was unskillfully loaded on said barge by piling the sacks containing said wheat loosely and insecurely to a great height on the central portion of the deck of said barge and around the hatchways therein; and with such knowledge carelessly and negligently permitted said barge so overloaded to remain at its docks until the afternoon of

October 21, 1892, before despatching it on said voyage to its docks at Astoria, whereby a large quantity of water accumulated in its hold through leaks in the bottom and sides thereof, and at
190 said last-named date, while so overloaded and water-logged, sent said barge on said voyage in tow of said steamer "Oklahama" in charge of said Marshal B. Short as captain, with said John August Peterson as deck hand on said steamer; and that by reason of said unsound and unsafe condition of said barge at the time and place alleged in said libel, said cargo of wheat suddenly shifted, breaking in and filling up said hatchways while said Marshal B. Short and John August Peterson were lawfully in the hold of said barge, in the discharge of their respective duties to the libellant and without any fault or want of care or caution on their part, thereby causing their deaths in the manner aforesaid; and each of said respondents prayed for judgment in the sum of five thousand dollars as damages to the estate of his and her respective decedent, occasioned by such death, and costs and disbursements.

Thereafter testimony was taken and proofs were adduced upon the issues thus joined and the said causes were argued upon the libel or petition of the said Oregon Railway & Navigation Company and the Oregon Short Line & Utah Northern Railway Company upon the separate answers as aforesaid of said Malvina Short, administratrix of the estate of Marshal B. Short, Sven Anderson, administrator of the estate of said John August Peterson, and Balfour, Guthrie & Co., and upon the testimony taken and proofs adduced the above-entitled court on February 19, 1894, made and entered its final decree in said cause wherein and whereby the said court adjudges and decrees as follows:

191 In the District Court of the United States for the District of Oregon.

The Barge "Columbia;" Oregon Railway & Navigation Company and The Oregon Short Line & Utah Northern Railway Company, Libellants and Petitioners; Malvina Short, Administratrix of the Estate of Marshal B. Short, Deceased; Sven Anderson, Administrator of the Estate of John August Peterson, Deceased; Anna C. Larson, William Boyce, and Balfour, Guthrie & Company, Respondents. No. 3163.

February 19, 1894.

This cause was heard upon the libel and petition of the Oregon Railway & Navigation Company and the Oregon Short Line & Utah Northern Railway Company, the answer and cross-libels filed thereto by the respondents, and the testimony, and was argued by Mr. W. W. Cotton, of counsel for said libellants and petitioners; by Mr. E. B. Watson, of counsel for the respondents Malvina Short, administratrix, Sven Anderson, administrator, and Anna C. Larson; by Mr. Charles F. Lord, of counsel for the respondent William Boyce, and by Mr. C. E. S. Wood, of counsel for the respondents Bal-

four, Guthrie & Company. On consideration whereof, the court finds:

192 First. That on October 21, 1892, the barge "Columbia," being loaded with 8,898 sacks of wheat on her deck, owned by the respondents Balfour, Guthrie & Company, was taken in tow by the steamer "Ocklahama" at Portland, Oregon, and by her towed to Astoria, Oregon, said barge and steamer being owned by the petitioners herein.

Second. That said barge and steamer arrived in safety at Astoria during the night of said October 21st, but that in making a landing the stem of said barge struck a floating pontoon, which was kept next the wharf as a fender, with such force as to cause said barge to spring a leak; that said leak was not considered serious or dangerous by those in charge of the said barge, and was not serious or dangerous.

Third. That said barge, about half an hour after striking said pontoon, was moved to a position behind said wharf, where she rested on the bottom of the Columbia river, which was there composed of soft mud, and, being listed against the dock, was in a safe position.

Fourth. That Marshal Short, master of said "Ocklahama," and Gus Peterson, one of the crew of said "Ocklahama," thereupon descended into the hold of said barge for the purpose of building a bulkhead to stop said leak, and at the same time John Ferguson, master of said barge, was assisting in pumping the water out of said barge by means of a siphon, the lower end of which rested in the bottom of said barge on the side away from the dock.

Fifth. That after the said barge had rested in this position

193 against the dock for about an hour and a half, and while said Short and Peterson were in the hold of said barge, said John Ferguson, on his own motion, negligently caused the cargo on the deck of said barge to be shifted until said barge was on an even keel and was no longer resting against the dock. At this time and for some time prior thereto the tide in the Columbia river was ebbing.

Sixth. That when said barge came to an even keel, she remained in that position for a short time, when the tide having ebbed, and she having no lateral support, said barge keeled over away from said dock, striking her bilge on the bottom of said river with great force causing the cargo to shift and carry away the deck-house, and a large portion of said cargo slid into said river, and the hull of said barge was broken down by the shock.

Seventh. That said Short and Peterson were unable to escape from the hold of said barge and were drowned, and said Wm. Boyce, who was in the hold of said barge was injured by being struck by said cargo in attempting to reach the deck of said barge.

Eighth. That said barge was seaworthy, and was at the time of the voyage in a suitable and proper condition for the purpose for which she was being used; that she was properly manned and was not overloaded, and that the said leak caused by striking the dock was not serious or dangerous; that the position in which she was

placed against the side of the dock was a proper and safe position, and that the accident was caused by the negligent shifting of the cargo on said barge by the said Ferguson, and the collapse was due to the exceptional strain to which the timbers were subjected
194 in the unnatural position in which she was placed when thrown upon her side; and that the steamer "Ocklahama" did not in any way cause the said accident.

Ninth. That John Ferguson, the master of the said barge, was a licensed mate upon the Columbia river, and there was no negligence on the part of the petitioners, or either of them, in employing the said John Ferguson. That the said John Ferguson occupied no position with either of the petitioners herein except that of captain of the said barge. That the said accident resulting in the death of Short and Peterson, and injuries to Boyce, and the loss of the wheat loaded on the said barge, occurred without the knowledge or privity of said petitioners, or either of them.

Tenth. That the petitioners, and each of them, having caused the said barge "Columbia" to be appraised, and having given a bond duly approved for the payment of the appraised value of the said barge into court, the petitioners, and each of them, are entitled to limit their liability for the loss and damage done and occasioned by the said barge to the sum of one hundred dollars, the same being the appraised value thereof.

It is, therefore, pronounced and decreed that said respondents do have and recover against said petitioners the said sum of one hundred dollars, without costs to either party; that said petitioners do, within ten days from this date, pay said sum into the registry of this court, and that in default thereof, that execution issue against Frank Dekum and H. C. Stratton, stipulators on the
195 bond given by said petitioners for the appraised value of said barge, therefore: and it is further ordered that the clerk of this court distribute said sum as follows: That he pay to said Malvina Short, administratrix, Sven Anderson, administrator, and Anna C. Larson, the sum of $33.33; to William Boyce the sum of $33.33, and to Balfour, Guthrie & Company the sum of $33.33.

That on the appeal said appellants and each of them shall seek a new decision on the facts and shall introduce new, other and different testimony which was not available at the time of the trial in the district court and was not known to appellants and could not with reasonable diligence have been discovered before said time.

That the special facts which the appellants shall seek to have reformed and upon which proofs shall be adduced are as follows, to wit:

That said leak was not considered serious or dangerous by those in charge of the said barge and was not serious or dangerous.

That, being listed against the dock, said barge was in a safe position.

That said barge rested against the dock for about one and one-half hours.

That said John Ferguson, on his own motion, caused the cargo on the deck of the barge to be shifted.

That said barge, with the ebbing of the tide, and having no lateral support, keeled over away from said dock striking her bilge on the bottom of the river with great force, causing the cargo to shift and to carry away the deck-house and a large portion of said cargo slid into said river.

196 That said hull of said barge was broken down by the shock.

That said barge was seaworthy and was at the time of the voyage in a suitable and proper condition for the purpose for which she was being used; that she was properly manned and not overloaded, and that the leak caused by striking the dock was not serious or dangerous; that the position in which she was placed was a proper and safe position, and that the accident was caused by the negligent shifting of the cargo on said barge by said Ferguson, and that the collapse was due to the exceptional strain to which the timbers were subjected; that the steamer "Ocklahama" did not in any way cause the said accident.

That the loss of the wheat loaded on said barge and the deaths of said Short and Peterson occurred without the knowledge or privity of said petitioners or either of them.

It will be maintained upon said appeal that the court erred as follows:

1. In not holding that by the bill of lading or shipping receipt for the wheat loaded upon said barge, said Oregon Short Line & Utah Northern Railway Company had especially contracted and agreed to be liable for all damages occurring by the actual neglect of its agents.

2. In holding that the proximate cause of the loss, damage and accident was the shifting of the sacks of wheat by the master of the barge, Ferguson, for the purpose of bringing said barge upon an even keel.

3. In holding that the loss occurred without the knowledge or privity of the petitioners or either of them.

197 4. In holding that the liability to petitioners was limited to the sum of one hundred dollars, the same being the appraised value of the barge.

5. In holding that the steamer "Ocklahama" was not liable for the loss and damage occasioned by said accident.

6. In holding that the barge "Columbia" was seaworthy.

7. In decreeing to respondents (appellants) the sum of $100 and no more and in failing to decree to respondents (appellants) the full relief prayed for in the respective answers.

Wherefore appellants pray that this their said appeal and assignment of error be allowed, and that citation issue according to due process of law.

WILLIAMS, WOOD & LINTHICUM,
*Proctors for Appellants.*

C. E. S. WOOD, *Advocate.*

Due service of the within appeal by certified copy, as prescribed

by law, is hereby admitted at Portland, Oregon, this April 3d, 1894.

W. W. COTTON,
*Proctor for Libellants and Petitioners.*

(Endorsed:) Filed April 3, 1894. R. B. Lamson, clerk.

And afterwards, to wit, on Tuesday, the 3d day of April, 1894, the same being the twenty-sixth judicial day of the regular March term of said court—present, the Honorable Charles B. Bellinger, United States district judge, presiding—the following proceedings were had in said case, to wit:

198 In the District Court of the United States for the District of Oregon.

The Barge "Columbia;" Oregon Railway & Navigation Company and The Oregon Short Line & Utah Northern Railway Company, Libellants and Petitioners; Malvina Short, Administratrix of the Estate of Marshal B. Short, Deceased; Sven Anderson, Administrator of the Estate of John August Peterson, Deceased; Anna C. Larson, William Boyce, and Balfour, Guthrie & Company, Respondents. No. 3163.

April 3, 1894.

Now at this day come the respondents Malvina Short, administratrix of the estate of Marshal B. Short, deceased; Sven Anderson, administrator of the estate of John August Peterson, deceased, and Balfour, Guthrie & Company, by Mr. C. E. S. Wood, of counsel, and present to the court their petition praying for an order allowing an appeal by them to the United States circuit court of appeals for the ninth circuit, from the decree heretofore entered in this cause on February 19, 1894, and also move the court to fix the amount of the bond to be given by them on such appeal; whereupon it is ordered that the prayer of said petition be granted, and that said respondents be, and they are hereby allowed to take the appeal
199 prayed for therein, upon giving a bond for costs on such appeal, with sureties to be approved by the judge making this order in the sum of five hundred dollars.

(Signed) CHARLES B. BELLINGER, *Judge.*

(Endorsed:) Filed April 3, 1894. R. B. Lamson, clerk.

And afterwards, to wit, on the 3d day of April, 1894, there was duly filed in said court a notice of appeal in words and figures as follows, to wit:

In the District Court of the United States for the District of Oregon.

The Barge "Columbia;" Oregon Railway & Navigation Company and The Oregon Short Line & Utah Northern Railway Company, Libellants and Petitioners; Malvina Short, Administratrix of the Estate of Marshal B. Short, Deceased; Sven Anderson, Administrator of the Estate of John August Peterson, Deceased; Anna C. Larson, William Boyce, and Balfour, Guthrie & Company, Respondents.

200 To The Oregon Railway & Navigation Company, The Oregon Short Line & Utah Northern Railway Company, libellants and petitioners, and to W. W. Cotton, their proctor:

Please take notice that the respondents herein, Malvina Short, administratrix of the estate of Marshal B. Short, deceased; Sven Anderson, administrator of the estate of John August Peterson; and Balfour, Guthrie & Company, and each of them, hereby appeals from the decree made and entered by the above entitled court in the above-entitled cause on the 19th day of February, 1894, and from the whole thereof to the next regular term of the United States circuit court of appeals for the ninth circuit, and that appellants have regularly and duly filed their appeal herein, which has been allowed.

WILLIAMS, WOOD & LINTHICUM.

Due service of the within notice by certified copy as prescribed by law is hereby admitted at Portland, Oregon, April 3d, 1894.

W. W. COTTON,
*Proctor for Libellants and Petitioners.*

(Endorsed:) Filed April 3, 1894. R. B. Lamson, clerk.

And afterwards, to wit, on the 3d day of April, 1894. there was duly filed in said court a bond on appeal in words and figures as follows, to wit:

201 In the District Court of the United States for the District of Oregon.

THE OREGON SHORT LINE & UTAH NORTHERN RAILWAY COMPANY *et al.*, Libellants, *Respondents*,
*v.*
BALFOUR, GUTHRIE & CO., MALVINA SHORT, Administratrix, *et al.*, Respondents, Appellants.

Know all men by these presents that we, Balfour, Guthrie & Co. and Malvina Short, administratrix, and Sven Anderson, administrator, as principals, and T. W. London as surety are held and firmly bound unto the clerk of the district court of the United States for the district of Oregon for the benefit of whom it may concern in the sum of five hundred dollars to be paid to the said clerk of the district court of the United States for the district of Oregon, his

successors, executors or administrators. To which payment well and truly to be made we bind ourselves and each of us jointly and severally and our and each of our heirs, executors and administrators firmly by these presents.

Sealed with our seals and dated April 3, 1894.

Whereas the above-named Balfour, Guthrie & Company, Malvina Short, administratrix, and Sven Anderson, administrator, have each of them respectively appealed to the United States circuit court of appeals for the ninth circuit, to reverse the decree in the
202 above-entitled cause by the district court of the United States for the district of Oregon.

Now, therefore, the condition of this obligation is such, that if the above-named Balfour, Guthrie & Company, Malvina Short, administratrix, Sven Anderson, administrator, or either of them, shall prosecute said appeal to effect, and answer all costs, of *he* shall fail to make good *his* plea, then this obligation shall be void; otherwise to remain in full force and virtue.

BALFOUR, GUTHRIE & CO. [SEAL.]
MALVINA SHORT, [SEAL.]
*Administratrix,*
SVEN ANDERSON, [SEAL.]
*Administrator,*
By E. B. WATSON, *Their Proctor.*
T. W. LONDON. [SEAL.]

Signed, sealed and delivered in presence of
H. H. PARKER.

UNITED STATES OF AMERICA, }
*District of Oregon,* } *ss:*

I, T. W. London, being duly sworn, depose and say that I am the surety in the foregoing bond, that I am a resident and householder within said district, and that I am worth in property situated therein the sum of one thousand dollars over and above all my just debts and liabilities, exclusive of property exempt from execution.

T. W. LONDON.

203 Subscribed and sworn to before me this April 3, 1894.

[SEAL.] H. H. PARKER,
*Notary Public in and for Oregon.*

Approved:
(Signed) CHARLES B. BELLINGER, *Judge.*

(Endorsed:) Filed April 3, 1894. R. B. Lamson, clerk.

In the District Court of the United States for the District of Oregon.
In Admiralty.

THE BARGE "COLUMBIA;" OREGON SHORT LINE & UTAH NORTHERN Railway Company and The Oregon Railway & Navigation Company, Petitioners,

*vs.*

BALFOUR, GUTHRIE & Co.; MALVINA SHORT, Administratrix of the Estate of Marshal B. Short; S. Anderson, Administrator of the Estate of John August Peterson, and William Boyce, Respondents.

Before Hon. C. B. Bellinger, judge.

PORTLAND, ORE., *August 25th*, 1893.

This case coming on regular- to be heard in the above-en-
204 titled court, the petitioners appearing by W. W. Cotton, Esq., their proctor; the respondent, Malvina Short, administratrix, appearing by Watson, Beekman & Watson: the respondents Balfour, Guthrie & Co. appearing by Williams & Wood, their proctors, and Wm. Boyce, respondent, appearing by C. F. Lord, Esq., his proctor, the following proceedings were had, to wit:

W. J. BURNS, a witness on behalf of respondents, being duly sworn, testified as follows:

Direct examination.

Questions by Mr. WOOD:

Q. Where do you reside?
A. At Portland.
Q. What is your business?
A. Shipping merchant.
Q. Have you been engaged in dealing in wheat?
A. Yes.
Q. For how long a time?
A. For about fifteen years.
Q. Do you ship and sell wheat to the European and English markets?
A. Yes.
Q. Did your firm own the wheat that was shipped on board the barge "Columbia," which was lost?
A. Yes.

Mr. WOOD: It is admitted by the pleadings that there were 8,898 sacks of wheat on board the barge "Columbia."

Q. Mr. Burns, what would be the weight of 8,898 sacks of wheat?
A. You have the figures there, have you not? They will refresh my recollection.
205 Mr. WOOD: Yes, I will give you the memorandum. (Handing witness paper.)
A. (continued). It would be 588 tons of 2,000 pounds each.

Q. At the time that this wheat was lost what was the value of that wheat, per cental?

A. $1.27½.

Q. How much is a cental?

A. 100 pounds.

Q. What was the value of the sacks?

A. That includes the sacks.

Q. What would then be the value of the wheat which was lost on the "Columbia"?

A. $15,001.85.

Q. Was the wheat insured as to its transmission, I mean down the river. Had you paid insurance on it, is there not an item of insurance there?

A. No, no insurance. Interest you mean.

The COURT: I suppose if there was interest that would lessen the loss, would it not?

Mr. WOOD: I presume it would, though that is an immaterial matter in this proceeding, whether it was insured or not.

Q. How much had you paid for stevedoring that wheat?

A. $125.

Q. What ship was it to be loaded on?

A. The "Westgate."

Q. Bound for where?

A. Bound for the United Kingdom.

Q. Was the "Westgate" delayed by reason of the loss of this wheat?

Mr. COTTON: I object on the ground that this is immaterial and irrelevant and not a proper measure of damages.

Objection sustained.

206 Q. Are you the agents for the "Westgate"?

A. We were the agents for the "Westgate," yes.

Q. And authorized to present her claims in a court of admiralty for recovery?

A. Yes.

Q. Now, I ask you whether she was delayed?

Mr. COTTON: I object on the ground that it is not a proper measure of damages.

The COURT: Is there any claim of damages on account of delay of the "Westgate"?

Mr. WOOD: Yes, sir.

Mr. COTTON: But not on behalf of the owners of the ship.

The COURT: These parties certainly could not recover under a claim of damages to themselves, for that is too remote. It is a matter of damages that could not have been within the contemplation of the parties. I will consider all these questions when I come to finally decide the case.

A. It was delayed five days.

Q. What was the damage by reason of that detention?

A. $780.83.

Q. Were you responsible to the "Westgate" for demurrage and detention?

A. Yes.

Q. What is the custom, Mr. Burns, as to selling wheat shipped abroad. How long do you hold it as your own property and how soon are you enabled to market it?

A. As soon as the bills of lading are signed for the total cargo then we can realize on the bills of lading.

Q. So you practically negotiate the bills of lading?

A. Yes.

Q. How much was the loss to you in interest on the
207 amount represented by the cargo of wheat by reason of the delay and your inability to negotiate the bills of lading?

A. $111.11.

Cross-examination.

Questions by Mr. COTTON:

Q. Is this ship's cargo insured down the river?

A. Yes, the cargo was insured.

Objected to as immaterial.

Q. Have you been paid the insurance?

Same objection.

A. The matter is in controversy.

Q. Has it been paid to you?

Same objection.

A. Yes, the amount has been paid to us.

Q. How much?

A. The amount of our claim.

Q. How much is it?

Same objection.

A. About $16,000.

Q. About $16,000?

A. Yes.

Q. When was it paid to you?

Same objection.

A. I don't recollect the date, some time ago.

Q. How long ago?

Same objection.

A. Shortly after the accident.

Q. Do you remember when this was paid?

A. About two months after the loss.

Q. Do you know the exact date?

A. I could not recall.

Q. Can you ascertain it?

A. I could ascertain it.

Q. You have no memorandum of it there?
208 A. Not with me, no.

Mr. COTTON: I will save an objection to this claim on the ground that Balfour, Guthrie & Co. are not the proper parties in interest.
The COURT: Very well.

Q. Where do you get this basis of value, Mr. Burns?
A. The market value at the time.
Q. Where?
A. In Portland.
Q. At this port?
A. Yes.
Q. You estimated this matter of interest from the day the loss occurred; that includes it up to the day you filed your libel on that value?
A. Yes.

(Redirect:)

Q. In the matter of this insurance, was it paid to you before you filed your claim in this suit, or after?
A. I don't recollect the date.

Excused.

W. K. SCOTT, a witness on behalf of respondents, being duly sworn, testified as follows:

Direct examination.

Questions by Mr. WOOD:

Q. What is your business, Mr. Scott?
A. I superintend the receiving and shipping of wheat for Balfour, Guthrie & Co.
Q. At what place?
A. Here in Portland.
Q. Did you superintend the shipping of the cargo of wheat that went aboard the barge "Columbia" some time in October last and was lost?
A. I did.
Q. Your superintendence was for Balfour, Guthrie & Co., was it?
A. Yes, sir.
Q. Had you given wheat to this barge before this?
209 A. Yes, several times.
Q. About what was the average load that you furnished to her and which she took?
A. Before this?
Q. Before this, yes.
A. Never exceeding 500 tons.
Q. What was the amount that was put aboard her this time?
A. 588 tons and some odd pounds.
Q. You may state any conversation that you had in the matter

of loading or the prospect of loading this barge with the full amount of wheat and with whom did you speak about it?

Objected to as immaterial and incompetent.

The COURT: The witness may answer the question.

Mr. COTTON: All this testimony is taken subject to the objection.

The COURT: Very well.

A. When I ascertained the amount of lighterage that had to go down to the "Westgate" and the barge was alongside of the dock I asked the captain of the barge if there was another steamer coming to take the balance of the lighterage. He answered me to the effect that the barge was to take all of it. Just what conversation I had with him at the time I can't recall, but I remonstrated and rang up Captain Pegram's office and put the same question to his chief clerk, Mr. Hendee, and got rather a curt answer that the barge could take all the lighterage without any trouble. And I then said that I had never before loaded more than 500 tons on any of the barges, either of the three, and his answer was of course that the barge would take it all. I had nothing more to do with it than to put the wheat on the barge.

210 Q. How long had the barge been lying at the dock before she commenced loading?

A. Probably over night.

Q. When she was loaded did you notice whether she was on an even keel or listed?

A. No, I did not take any notice at all of the barge.

Q. After she was loaded how long was she lying at the dock before the "Ocklahama" made fast?

A. I can't recall just how long; probably the "Ocklahama" came along next morning and took her down, as far as I can remember. I am not sure as to that.

Q. Are you engaged in superintending the weighing of wheat?

A. Yes.

Q. Familiar with it?

A. Yes.

Q. How long have you been engaged in that?

A. Five years and a half now with Balfour, Guthrie & Co.

Q. What was the weight of this particular cargo of wheat that was put aboard of the "Columbia"?

A. 588 tons.

Q. You made no special request for this particular barge for lighterage; it was sent to you by the company without any notification, was it?

A. Yes, we merely ask for means of transportation; we don't know what is coming at all.

Cross-examination.

Questions by Mr. COTTON:

Q. You refer to three barges, Mr. Scott. What barges were they?

211 A. The "Columbia," "Columbia Chief" and "Autocrat."

Q. Do you know anything about the relative sizes of those barges?

A. I do not.

Q. You don't know anything about their registered tonnage, do you?

A. No, nothing whatever.

Q. What did you say your duties were?

A. To superintend the receiving of grain in the warehouse and sampling it and seeing it put aboard the vessels.

Q. Loading it, turning it over to barges and matters of that kind?

A. Yes.

Q. Where were you at work at this time?

A. On Montgomery dock.

Q. Did you get all this grain on board the barge?

A. It was all put on board, yes; stevedores put it on board.

Q. Was there sufficient room to get it on board?

A. By piling it up, yes, there was room.

Q. What was the reason that you remonstrated against putting this grain on board?

A. Captain Troop always gave me to understand that we were not to put more than 500 tons on any of these barges.

Q. Why?

A. Those were his instructions; I got them three or four years ago.

Q. Do you know why?

A. No; I don't know why. They were his instructions, that we were not to overload.

Q. Was not that circular issued for a particular purpose?

A. Which circular?

212 Q. The circular about the 450 tons that you are referring to?

Mr. WOOD: I don't think the witness is referring to any circular.

Q. You say Captain Troop told you?

A. Captain Troop issued no circular; they were merely verbal instructions that we were not to put more than 500 tons on any of those barges.

Q. Why did you remonstrate?

A. I don't know whether I remonstrated any, I merely called their attention to the fact that I thought they were overloading the barge, and that we had never put more than 500 tons on any of these barges before.

Q. What did you say to them?

A. It is so long ago that I just can't remember the exact conversation. I merely asked Mr. Hendee if he intended to put all of this wheat on board this barge, and I think he asked what was the matter with us fellows down there, of course it was all going aboard, she was quite capable of taking it all; some words to that effect; I can't just recall them now.

Q. And then after you remonstrated you put it all on, did you?

A. We had nothing else to do; the barge was there at their orders.

Excused.

S. B. HENDEE, a witness on behalf of respondents, being duly sworn, testified as follows:

Direct examination.

Questions by Mr. WOOD:

Q. Mr. Hendee, what is your business?

213 A. Chief clerk in the office of the superintendent of water lines of the Union Pacific system.

Q. Who is the superintendent of the water lines?

A. Captain Pegram.

Q. What are his duties?

A. General supervision over the water line and craft owned and leased by the Union Pacific system.

Q. Are all barges and lighters and tow-boats on the river under his exclusive management and control?

A. All operated by the company, yes, sir.

Q. Do you, in the absence of Captain Pegram, or in the executive part of the office, have charge of the office?

A. Yes, sir.

Q. Did you have any telephone message or verbal talk in regard to loading this wheat on the barge "Columbia"?

A. Yes, sir.

*Q. Did you have any telephone message or verbal talk in regard to loading this wheat on the barge "Columbia"?*

*A. Yes, sir.*

Q. What was the message or conversation?

Respondents' counsel objects on the ground that it is incompetent and immaterial and not *res gestæ*.

A. That has been a good while; I can't exactly state, any more than the question was asked whether they should put all the wheat on that barge and I said certainly, put it all on.

Q. Where was Captain Pegram at that time?

A. I don't remember now whether he was in there or not.

Q. Had you received any instructions from Captain Pegram in this matter?

214 A. No, nothing more that in a general way.

Q. In a general way, what were those instructions in regard to the loading of the barge?

A. The different barges were supposed to carry different quantities of grain, different tonnage, and the general reputation of the barges; they were to be loaded to a certain tonnage, that is all.

Q. What was the tonnage of this barge ordinarily?

A. She ordinarily carried all the way from 500 to 600 tons and sometimes a little over, that is this particular barge.

Q. When had she carried 600 tons to your knowledge?

A. She carried 600 tons about a year before that.

Q. About what date would that be?
A. Probably in October some time.
Q. October of 1891?
A. Yes, I guess it would be October of 1891; yes.
Q. Was that net weight or measurement tonnage?
A. That was the usual measurement, shipping ton, short ton.
Q. It was measurement tonnage?
A. Yes.
Q. That would not mean then as much as 500 tons net weight, would it?
A. Yes, it would mean more.
Q. How much would it mean in weight?
A. I can't exactly give you the rule for that.
Q. It would be less in weight than of wheat, would it not?
A. A ton in measurement is considered generally—yes, it would be less in weight.

215 Q. Now, Captain Pegram knew about your orders that this barge should carry this wheat, did he not?

Objected to as immaterial and incompetent.
The COURT: The testimony may be taken subject to the objection.

A. I think he did; I don't remember just now whether he was in the office at the time or not; I might have referred the matter to him, as I usually do when he is near or in the office, but I would not say positively whether he was there or not.
Q. But whether he was there at that immediate moment or not, are you clear in your mind as to whether Captain Pegram knew as a matter of fact that the barge was going to carry this load; did he not know that as a matter of fact?
A. Yes, I think he did; I think he knew something about it at the time.
Q. I will refresh your memory if you will allow me. When you gave your first deposition, did not you state these facts, and are not these facts substantially true, that Captain Pegram was in the office and knew the conversation that was going on as to the loading of the barge, and you referred it to him, and he said, "Yes, load her;" don't you remember now that those are the facts?
A. I don't doubt but what they are. I have not troubled my memory or talked over the question since, and of course in that time a matter of that kind would be very easily forgotten. These are occurrences that happen every day in referring matters to him in answering questions direct, that is, all through the shipping season.
Q. (Handing witness paper.) Are these circulars issued from your office?

216 A. These were issued by Mr. Baxter, and I presume after consultation with the office.
Q. After consultation with Captain Pegram?
A. Yes.

(Cross:)

Q. You don't know Mr. Hendee?
A. No.

Mr. COTTON: Please confine yourself to a statement of facts.

Q. These are the official circulars of the company?
A. Considered so; yes, sir.
Q. Do you know anything about the age of the barge "Columbia"?
A. No, sir.
Q. Or when she was last repaired?
A. I know when she was last repaired; that is, she was repaired in the spring.
Q. In the spring of what year?
A. In the spring of last year, 1892, I believe it was.

Mr. WOOD: We offer this circular in evidence.
The same is received without objection and marked "Respondents' Exhibit No. 1."

(The COURT:)

Q. What time did this accident occur?
Mr. WOOD: On the morning of the 21st of October of last year.

Cross-examination.

Questions by Mr. COTTON:

Q. What kind of a cargo was this 600-ton measurement that you referred to?
A. That was wheat, I believe, to the best of my knowledge; yes, wheat I think it was.
Q. Do you remember the cargo of lighterage brought up from the "Indiana" on this barge?
217 A. No, I don't remember that. I think Mr. Rathbon had charge at the time.
Q. Who did you say issued this circular?
A. It is issued by the Union Pacific Railway Co.
Q. Who signed it?
A. It is signed by Mr. Baxter—approved by Mr. Baxter and signed by Captain Pegram.
Q. To whom does your office report for orders?
A. To Mr. Baxter.
Q. Who is Mr. Baxter?
A. The general superintendent.
Q. Where does Mr. Baxter live?
A. In the city of Portland.
Q. Where does Mr. Baxter have his office?
A. In the Worcester building.
Q. Was Mr. Baxter away at that time?
A. I don't remember whether he was or not.
Q. Did he have his office here?
A. His office was here; yes, sir.
Q. He has charge of all the business of the company located at this port, has he not?
A. Yes, sir.
Q. And Captain Pegram is one of Mr. Baxter's subordinates?
A. Yes, sir.

Redirect examination:

Q. Mr. Hendee, as a matter of fact, would you ever refer to Mr Baxter a question of the loading of the barges on the river?

Mr. COTTON: I object as being incompetent and immaterial.

A. In the general routine of business, the small details of every-day business, I do not presume would be referred to Mr. Baxter.

218 Recross examination:

Q. Mr. Hendee, you do two kinds of business with these barges, do you not; you rent them at times to shippers to bring up their own lighterage, don't you?

A. Yes, sir.

Q. Just state that mode of business.

A. In renting them to ships coming up the river for lighterage, the cargo generally consists of merchandise and iron and of like stuffs, and in using them in going down we rent them for straight grain cargo. The lighterage coming up is of entirely different character from the wheat. The wheat can be piled in midships of the barge, and it is consequently limited to prevent that piling so as to make the weight as evenly distributed over the barge as possible, so as to always insure against liability of straining the barge.

Q. You rent barges, don't you; that is, these same barges for lighterage purposes?

A. Yes, sir.

Q. How much do you charge for them?

A. $25 a day for up lighterage.

Q. Generally your upstream business is all done by renting lighterage, as a general rule?

Objected to as immaterial and irrelevant.

A. Yes, sir, as a rule.

Q. And your downstream business is generally done at so much a ton?

A. Yes, sir.

Q. That is the difference in the two classes of business, isn't it?

A. Yes, sir.

Excused.

219 L. W. BENEDICT, a witness on behalf of respondents, being duly sworn, testified as follows:

Direct examination.

Questions by Mr. WOOD:

Q. Mr. Benedict, what is your business?

A. I have followed ship-building for 28 years.

Q. You have been a ship carpenter, have you?

A. Yes, sir. I am not in that business just at present.

Q. What business are you in at present?

A. I am on the police force in the city of Portland.

Q. What is your position in the craft of ship-building? Were you ever a master or builder?

A. I have been. I have acted in various capacities in the ship-building line.

Q. Did you ever work on the barge "Columbia," belonging to the Oregon Railway & Navigation Company?

A. Yes, sir.

Q. At what time?

A. I can't give the exact date as to the commencement of the work or the time of quitting the work?

Q. About how long?

A. Some time about the 8th or 10th of April, 1892, that the work was commenced; somewhere in that neighborhood.

Q. Were you in the employ of the company then?

A. Yes, sir.

Q. How long have you been in its employ?

A. Three or four times.

Q. State what the repairs were generally that you were
220 engaged in, in putting on the barge "Columbia."

A. It was principally guard-work; what we call guard-work, taking out old rotten beam ends from the outside of the hull, cutting away the old rotten wood and building on a new guard, splicing on new beams.

Q. What are the guards?

A. The projection on the outside of the house on the deck frames, what they call the nosing or fender, to protect the house.

Q. It is a sort of narrow platform running around the hull, but not part of the main hull?

A. Yes, sir.

Q. What other work did you do besides repairing the guards?

A. We put in several new beams from the forward end of the house to the stem. These beams run from the forward end of the house clear across the boat, but the beams along amidships from the forward end of the house to the aft end of the house were only short beams, I think, ten or twelve feet long, put in alongside of the old ones and spiked to the old ones.

Q. You cut in alongside of the old beams, took out the worthless portion and spiked in new timber?

A. Yes, sir.

Q. Did you do anything else?

A. We took out a portion of the transom, what we call the transom.

Q. What is the transom?

A. The stern of the boat. We took off one plank and I think a
221 portion of the second plank from the top, put on what we call a fan-tail, a new fan-tail entirely around the stern, the projection of the guard around the stern, the same as along the side.

Q. In order to protect the stern?

A. Yes, sir; a deck platform to walk on to handle the boat.

Q. Were these all of the repairs that you put on her, so far as you can recollect?

A. It was all to any extent.

Q. Were you in charge of the repairs or were you working under instructions as to just what to do?

A. I was working under instructions. I did what I was told to do and nothing more.

Q. Did you do anything whatever below the water line?

A. No, sir.

Q. Did you do anything whatever to the stem of the boat?

A. I don't think the stem was touched; if it was I don't recollect it.

Q. Or to the sternpost or any of the main timbers of the hull?

A. You mean the frame of the boat?

Q. Yes.

A. No, sir, nothing to amount to anything; there was a little spot abreast of where the hog chains came in, from the strain of the timbers a little; they were replaced with new timbers, only two or three short pieces put in from the top.

Q. While you were at work on her did you see any evidence of rotten timbers and rottenness that you did not replace, that is that you were not ordered to replace?

A. I was not instructed to make any examination of the
222 kind. Of course, there was undoubtedly more or less rotten wood there, principally on the outside of the timbers next to the planking; sometimes it is very thin, other times it is an inch or two in thickness, rotten wood outside of the timber next to the planking. Wherever two sticks of timber cross one another there will be necessarily a rot within a year or two between the two timbers, plank cross-frames.

Q. I say did you see any evidence of such rotten timber?

A. I saw some, yes, sir, at the forward end of the boat where I had occasion to work; I considered it slight, on account of our having no chance or opportunity to take the planking off and examine it.

Q. Were you ordered to take off such places and examine them or to make any examinations whatever?

A. No, sir.

Q. You had you say no discretion?

A. No, sir, I was not there for that purpose.

Q. Now, Mr. Benedict, have you seen this same barge "Columbia' since the accident?

A. Yes, sir.

Q. Where did you see her?

A. I saw her lying inside of the company's dock at Astoria.

Q. How long after the accident?

A. I don't know exactly how long; I don't know that I can give the date when it was wrecked.

Q. She was still in the same position where she had sunk?

A. I think she was.

Q. Did you examine her then?

A. I did as much as I could. I could not get around on her much; she was nearly all under water when I was there.

223 Q. From what you saw of her did you consider her so tight, staunch and strong as to be fit for lightering business on the Columbia river on which she was engaged?

Mr. Cotton objects as incompetent.

The COURT: This witness may state what facts he knows and you may then question him as to the effect of those facts on any special circumstances or features.

Q. Did you notice any of the boat which was below the water line in any way?

A. At what time?

Q. When you saw her after the accident.

A. Just a portion of the stem and the forward end of the boat, which would be under water when the boat was loaded, was out of the water when I saw her at Astoria, on account of the stern being in a sort of hole, and the bow on an incline, lying somewhat on an incline.

Q. Did you notice any of the men in timbers of her hold at that time?

A. Yes, sir; and pushing away from the forward end, I could not see any further than the forward end because her stern was under water.

Q. Now state what timbers you noticed from the stem to the stern; go along it as far as you can and state in what condition they were.

A. They were broken off apparently from the weight of the cargo capsizing the boat as it did; the weight of the cargo carried the deck right along with it and broke the timbers right along what we call the line of the bilge strake—she was listed to shore and the load went toward shore—when these timbers were broke off

224 on the shore side, the timbers on the other side followed on account of their being tied by fastenings and it canted over.

Q. I don't know as I understand what you mean by being tied by fastenings?

A. The two side walls of the boat, when one tilted over toward the bilge, the other followed and broke off on this bilge strake; as far as I could see, the frames were all apparently broken off right on that bilge strake.

Q. What was the condition of these main timbers, the stem, and so on, as to soundness?

A. The stem was knocked off, partially knocked over to the starboard side opening out what we call the rapid alongside of the stem; that is, the division of the joint between the stem and the end of the planking opened it out, as near as I could get to it; I could push my hands right into the opening.

Q. What was its condition as to soundness; was it sound timber or not?

A. The stem was considered sound; it was shattered a little some time ago, but that was repaired; we had her at the bone yard during the other repairs; that was the only thing that was done.

Q. Did you observe any timbers which were unsound or rotten?

A. Some of them appeared to be rotten where they crossed the bilge streak, but as to the extent of the rot I could not ascertain, because I could not get down into it without jumping into the water.

Q. Where did the weakness seem to be, where the boat first gave away, with reference to the bilge streak?

A. The weakness seemed to be right where the main boat frame crosses the bilge streak.

225 Q. And that is where you found the rotten timber?

Mr. COTTON: I object. Please don't lead the witness.

A. Yes, sir.

Q. Have you been familiar with the barges used by this company, or used generally on the river here?

A. Not very much so; I have worked on them, off and on them occasionally, small repairs.

Q. Do you think that this barge in question was in a fit condition as to staunchness, strength and seaworthiness to have carried, say, 500 tons of wheat?

Mr. COTTON: I object to that on the ground that it is incompetent. It asks the witness to pass upon the ultimate question to be decided by this court.

Objection overruled.

A. I don't understand much about the loading of a vessel at all, but I would not judge that it was a boat fit to be loaded extra heavily.

(COURT:)

Q. Would you know what extra-heavy loading was?

A. I don't know whether I would or not; I don't think I would. Piling up wheat ten sacks high might be considered heavy by shipping men; I am not a shipping man and don't know anything about shipping of freight.

Q. In your opinion as a ship carpenter, at the time that you repaired this barge or worked on her, was she, in your opinion, put in full and complete repair as she ought to have been?

Objected to on the ground that the witness is incompetent to express an opinion.

Objection overruled.

226 A. I think she had ought to have had some repairs done on her hull that she did not get. Of course, it was none of my business to look after that. I was doing what I was told to do. While I was there she did not get any repairs on the hull at that time.

Q. Do you think from your examination of her made after the accident that she would have taken the bottom, and as the water left her have held up under the load that she had on, we will say 500 tons, distributed on her; do you think that she would have en-

dured the strain caused simply by the water leaving her and letting her down on the bottom?

Objected to as incompetent, the witness being incompetent to express an opinion.

The COURT: I have serious doubts as to whether the witness is competent to answer the question, but I will let him answer.

A. I don't think she was strong enough to stand it; no, sir; it would take a pretty strong boat to stand a pressure of that kind. There are a great many boats built that could not stand it.

Q. What is the shape of her bottom?

A. Round to a certain extent; not exactly round either, flat in amidships.

Q. Had she a keel?

A. Yes, sir.

Q. And a bilge?

A. Yes, sir.

Cross-examination.

By Mr. COTTON:

Q. Mr. Benedict, have you worked on other barges besides the "Columbia;" you have, have you not?

A. Yes, sir.

Q. What was the shape of their bottoms?

227 A. Which other barges would you mention?

Q. The "Autocrat" and "Columbia Chief."

A. They are very similar to the "Columbia."

Q. That is the general shape of barges used on the Columbia and Willamette rivers, isn't it; they have that kind of bottoms?

A. For that kind of floating it is.

Q. That is the usual and general shape?

A. Yes, sir.

Q. Not only the company's boats, but others running on those rivers?

A. They vary sometimes according to models.

Q. But the general model is a sharp point and a round bottom tending to more or less flattening in the middle and then rounding off toward the hull again?

A. Yes, sir.

Q. They are considered a proper kind of boat for use on the river, are they not, so far as the mere shape of the bottom is concerned?

Mr. Wood objects as incompetent.

A. For the use that they are put to, lightering on deep water.

Q. I mean on the bottom, that is the usual construction among shipmen and ship-building men.

A. It depends whether it is for deep or shallow water.

The COURT: There is no question as to the proper construction of this boat.

Mr. COTTON: It is claimed that she is round instead of flat, and

that she ought to have been flat, and I wanted to clear that point up, inasmuch as counsel has asked about her bottom.

228 Q. What timbers were those which you put across the deck?

A. What we call deck beams; they were not full deck beams because they did not go clear across the vessel.

Q. I understand that this boat comes down sort of ribbed shape to a keel and then comes up to the top and what we call the frames then terminate right under the deck?

A. How is that?

Q. I say this boat's stem had a keel and comes up ribbed shaped and curved like that (indicating) and then at the top she tops off, what we call the frame- terminate.

A. Yes, sir, they terminate right underneath the top, right flush of the deck beams.

Q. Then right around the top frames there are two timbers bolted together, are there not?

A. Yes, sir; what we call the sheer strake and the clamps: the sheer strake on the outside and the clamps on the inside, and held together by screw-bolts.

Q. Then across from the top of this sheer strake are placed the deck beams?

A. Yes, sir.

Q. And that is the only connection which these beams have with each other crosswise of the boat, is it not?

A. Yes, sir.

Q. Now, you said timbers across the deck. You mean by that what I have erroneously called deck beams, do you not? Timbers across the deck are the deck beams, are they not?

A. That is what we call deck beams. The only timbers used across the deck for a boat of her class are the deck beams.

229 Q. And there is no connection between the framework of the boat down below this deck beam, is there?

A. A bulkhead right in the center resting on the keel built right up and the beams bend over the bulkhead; the bulkhead runs up to the deck.

Q. But they simply connected two of the frames together?

A. It connects with the deck beam in the center.

Q. It had no connection with the frame?

A. No, sir, except the fastening put down into this bulkhead, the same as if I would put a deck where that beam extends out to the side of the vessel, and there is a bolt up in there that connects that bulkhead and the gunwale together, so that they could not swing.

Q. The only connection between the frame on one side and the opposite frame on the other is the fastening down at the keel and the deck beams at the top?

A. There is what we call the bilge strake.

Q. Listen to my question, please. I want to get this in the mind of the court. The only connection between the frame on one side and the frame on the other is the fastening at the keel and the deck

beams across the top, the frame on one side and the frame on the other side of the boat, is that so?

A. That is right, except sometimes they put a brace in there.

Q. What braces were there in this boat?

A. There was a stringer put between the center bulkhead; I don't know but what there were two of them, I would not be positive about that, and stanchions put under the stringer; and I am not sure whether there were braces particularly in this barge
230 or not, leading from the keel on each way, bracing underneath the deck beams; I am not positive; some boats have them.

Q. They run from the keelsons, but they did not run from one frame to the other, did they?

A. No, sir.

Q. The keelsons and the bilge strake are timbers which run lengthwise of the boat, are they?

A. Yes, sir.

Q. And are bolted onto those beams?

A. Yes, sir.

Q. Where is the bilge strake located?

A. On the bilge.

Q. What do you mean by that?

A. Where the boat begins to turn up.

Q. Right at the edge of the turn?

A. Yes, sir.

Q. Now, you say that certain timbers were broken at the time that you saw her. Whereabouts with reference to the bilge strake were these timbers broken?

A. Right across the bilge strake, as far back as I could see.

Q. How far back could you see?

A. As far as the forward end of the house.

Q. How many feet?

A. I could not tell exactly.

Q. About how many?

A. I should think perhaps 45 or 50.

Q. What was the length of the boat?

A. I don't know its exact dimensions; I never measured her; I was not working on her when she was constructed; if I had I would know her length.

Q. These timbers were broken at the top portion of the bilge strake, as you say, were they not?

231 A. Yes, sir, most of them as far as I could see right where the bilge strake crosses the timbers.

Q. Right at that upper edge?

A. Yes, sir.

Q. They were cracked right there?

A. Yes, sir.

Q. Do you know whether they were broken on the side other than the one you examined?

A. No, I don't know; they did not appear to be.

Q. When you examined her you said you saw some rotten; where was this rotten?

A. It was in the neighborhood of where those timbers crossed this bilge strake.

Q. How many timbers did you find rotten?

A. I did not go down in there to see how many were rotten; I saw from the deck what I think was rotten and I am pretty positive it was rotten. I am a pretty good judge of rotten wood when I see it. I have been at the business for a great many years. I don't mean to say that all of her timbers were rotten by any means. I say there were rotten timbers there,

Q. How many did you see?

A. I did not count them.

Q. How many do you think?

A. I don't know that I could tell positively.

Q. About how many?

A. I could not give an estimate, because I cannot tell how many timbers there were. I don't want to give any estimate on it because I don't want to tell a thing that I don't know.

Q. Do you mean the court to understand that all of those timbers were rotten?

A. No, sir, I do not.

Q. About how many of them were rotten?

232 A. At least half of them, I should think.

Q. You are quite positive that at least within forty feet half of them were rotten?

A. I don't mean rotten entirely, but what we call rotten wood. There is a great deal of wood in a vessel half rotten and some not considered sound timber.

Q. That was the appearance as it seemed to you as you stood there and looked at it?

A. Yes, sir.

Q. Where was this located, this rotten wood?

A. It was right across the bilge strake.

Q. Above or below?

A. Mostly above, as far as I could see. Some of it was down in behind the bilge strake; some of them will break at the top edge; some might break behind it. I could not swear they were all broken right flush at the top.

Q. You say half were rotten?

A. I should estimate about half.

Q. How many were there?

A. I cannot give any idea at all as to the number.

Q. It is just simply your idea?

A. I don't know what the number was. I can't say anything about that.

Q. That was a distance of 40 feet?

A. I should think about that; I did not measure the distance; what I could see of the forward end of the boat that was above water.

Q. You say you repaired her, assisted in repairing her?

A. Yes, sir.
Q. Under whose direction was she repaired?
A. Mr. Carstens'.
233 Q. Who is Mr. Carstens?
A. The master mechanic of the company, I believe, Peter Carstens.
Q. What is he?
A. Master mechanic, as I understand; I have always taken orders from him when I worked there.
Q. Is he a boat-builder?
A. Yes, sir.
Q. How long have you known him?
A. I have known him, I guess, about twelve or fifteen years.
Q. What has been Mr. Carstens' business during that time?
A. He has always been a boat-builder when I have known him or seen him.
Q. What timbers did you say that you noticed were rotten at this time when you were repairing her?
A. Some of the side timbers; what we call ribs or frames.
Q. Did that run all the way back?
A. I could not tell you as to that, because we did not work the whole length of the boat on that particular kind of work; the deck was not separated sufficient to give us a chance to see the body of the frame; I was not there to inspect it.
Q. Then you did not examine it amidships this time when you repaired her?
A. I did not, because I was not sent there for that purpose.
Q. And your testimony does not relate to the amidships at all?
A. Not as to the body of the boat; as I told you before, I
234 could not see the body of the boat when I went down because she was under water.
Q. I am referring now to the time when you made repairs on her?
A. I have no idea of the condition of the frame amidships particularly, because it was always dark when they were working in there.
Q. Did you have any idea of it from any examination?
A. I did not make any examination.
Q. You did not make any examination?
A. No, sir.
Q. What part did you examine at the time you repaired her?
A. When I was working on her?
Q. Yes.
A. Taking out deck beams and putting in new ones; that was the part I examined and worked on and renewed.
Q. Your testimony as to the time you made the repairs relates to the timbers?
A. I did nothing at all, as I said before, on the hull.
Q. The timbers which you were taking out and replacing?
A. Yes, sir, the deck beams.
Q. Did you replace these with new timbers?

A. Yes, sir, what I put in was new, and were spiked to the old ones, alongside of the old ones.

Q. Were they also bolted to the sheer strake?

A. Yes, sir, most of them were, so far as my knowledge goes.

235 Q. I think you have explained this before, but I will ask you again. When these repairs were made, were any repairs made to the frame and hull of the boat by anybody?

Mr. COTTON: I object to that unless the witness states he knows.

Q. Do you know all the repairs that were put on the barge at the time you worked on her?

A. Nearly so, except the stern, that I mentioned before; that is a portion of the hull; there were no repairs done except a piece of frame where the hog chains are in the side; that was the only thing that was put in in the way of a new frame that I know of.

Recross-examination.

Questions by Mr. COTTON:

Q. You had certain work assigned to you?

A. Not particularly so; I worked at all sorts of jobs on the boat wherever I was put to work.

Q. You did what you were told to do?

A. Yes, sir.

Q. And Mr. Carstens was superintending it?

A. Yes, sir.

Q. How many were there at work there?

A. I could not tell you; the book-keeper could tell you better than I can.

Q. About how many?

A. I should think there were six or eight men; not more than eight, I think.

Thereupon a recess was taken to 1.30 p. m.

1.30 O'CLOCK P. M.

A. H. RIPLEY, a witness called on behalf of respondents, being duly sworn, testified as follows:

236 Direct examination.

Questions by Mr. WOOD:

Q. Mr. Ripley, what is your business?

A. Clerk for J. R. Cameron.

Q. What are your special duties?

A. Keeping account of all wheat received and all wheat shipped through our office.

Q. Have you ever had charge for them, as far as they were concerned, of delivering wheat to the lighters and barges of the Oregon Short Line for lighterage down the river?

A. No.

Q. What do you do in connection with such lighterage of wheat?

A. The amount of wheat shipped on the dock is turned into the office; I foot up the weight of the wheat shipped.
Q. Ascertain what has been shipped?
A. Yes, what has been shipped; it is turned in on the books in car-loads, certain cars going on certain ships and boats, and I must keep track of each car-load.
Q. You keep a record of the lighters or boats by which it is taken down?
A. Yes, sir.
Q. Have you any record showing the amount shipped on the barge "Columbia" at any time?

Mr. COTTON: Answer yes or no, whether you have.

A. Yes.
Q. Where is the record?
A. At the office.
Q. Will you produce it?
A. No, I have a memorandum.
Q. I say, can you produce it?
A. I can produce it.

237 Mr. WOOD: Please produce the record as to the barge "Columbia," and any other barges of this company that were loaded with wheat anywhere within the year, say from October, 1892.

No cross-examination.

JAMES COLLINS, a witness called on behalf of respondents, being duly sworn, testified as follows:

Direct examination.

Questions by Mr. WOOD:

Q. Mr. Collins, what is your business?
A. Ship carpenter.
Q. How long have you been engaged in that occupation?
A. Forty years.
Q. Have you ever worked for the Oregon Railway & Navigation Company?
A. Yes, sir.
Q. When?
A. I was working on the barge "Columbia." I have been working for that company off and on for the last 18 or 20 years.
Q. You were working on the barge "Columbia"?
A. Yes, sir.
Q. At the same time that Benedict, who testified, was working on her?
A. Yes, sir.
Q. State how long a time you worked on that barge at that time.
A. About six weeks; I commenced in May.
Q. Were you with the entire job?
A. No, sir; I did not commence on her; I was working on an-

other job and we were taken from that to put on the barge because they were in a hurry for her.

Q. Were you with the job until it was completed?

238 A. Yes, sir; with the exception of planing off the sheathing; there were a few rough surfaces upon that; but I worked on the job until it was completed.

Q. With the exception of what?

A. There were two or three men that cleaned the deck sheath off after we got through.

Q. State what repairs were put on the barge at that time.

A. We put on a new guard all around her and one strake of the transom; the upper strake of the transom was rotten and part of the new deck aft that went onto the transom, and put new sheathing over all of the deck.

Q. Was that all, substantially?

A. They put a new guard on all the way around, cut off all the old beams that were rotten and put on new ones; lapped them inside.

Q. All of the old beams of what?

A. Of the "Columbia."

Q. Of the barge "Columbia" throughout?

A. Yes, sir.

Q. Now, did you do anything to her hull?

A. No, sir.

Q. Or her main timbers, the frame?

A. No, sir.

Q. When you say you took all of the rotten beams out of the "Columbia," what do you mean?

A. All of the rotten ends of the beams; we did not go all the way across, because they were just as good as they were at first.

Q. What beams are you talking about?

A. The beams that go across the hull.

Q. The deck beams?

A. Yes, sir; that bind both sides of the hull together.

239 Q. Was there anything done to the framework of the barge at all?

A. No, sir; not at that time. We did not do anything except the transom; I consider the transom the hull.

Q. What did you do with the transom?

A. Put on a new strake above; it was rotten.

Q. What do you mean by a strake?

A. A strake is about 4 by 16, the whole way across the stern of the boat to fasten the plank to, to connect the hull together.

Q. Did you do anything to the stem?

A. No, sir.

Q. Did you do anything to the braces?

A. No, sir.

Q. Nor to the keel?

A. We could not very well work at the keel with her afloat.

Q. She was afloat, was she?

A. Certainly.

Q. At this time?
A. Certainly.
Q. Did you do any repairs below the water line?
A. No, sir; we could not very well do that either; she was afloat.
Q. Did you have charge of this work?
A. No, sir.
Q. Were you working under orders?
A. Yes, sir.
Q. In your work did you see any rotten timber about the barge that was not replaced?
A. We had nothing to do with looking after timbers that were rotten, but only to do what we were told.
Q. Did you see any rotten timbers?
A. You had to try them to know that; looking at the timbers would not do.
Q. Why not?
240 A. Because you would have to go and pick them with a chisel to find if they were rotten; that was not my work; there was a man to do that.
Q. You mean on the outside it might look sound?
A. Certainly, and it might not be sound, and it might be.
Q. Did you see anything while you were working on the barge that gave you the impression, as a ship carpenter, that all the repairs that ought to have been put on her were not put on her?

Respondents' counsel objects.

A. I don't know; I could not tell that; I would have to go and try them; I have had charge of work myself, and I would have to go and try them to see if they wanted it.
Q. Do you know whether or not this was done?
A. I did not do it.
Q. Have you seen the barge "Columbia" since the wreck?
A. No, sir.
Q. Were you acquainted with the barge "Columbia" before this time that you worked on her?
A. I never worked on her before I was in Portland; Mr. Stefen built her, but I never worked on her before; I might have hung the rudder or put on something like that, but I never worked on her hull before.
Q. How long ago was she built?
A. I don't know exactly; I guess she must have been built fifteen or sixteen years ago, somewhere thereabouts.
Q. Had you put any repairs on her before this time that you speak of?
241 A. No, sir, not that I know of; I might have hung a rudder or so for the company.
Q. How long have you been with the company about, at this time?
A. For the last twenty years, but I have done nothing for the last seven years until I worked on the "Columbia," except the guardings; though I worked on the boats when Mr. Stefen had the contract,

but I did nothing for the company for six or seven years prior to that time.

Q. Are you acquainted with any other barges on the river?

A. Yes, I know most of them.

Q. Do you know from the build and condition of a barge about what load she ought to carry?

A. Yes, when I go aboard I can tell pretty near; I would have to examine her; I can tell pretty near what a barge ought to carry.

Q. What would you say would be a proper and sufficient load for the barge "Columbia" if she was a sound boat?

Counsel for respondent objects as incompetent.

A. I am not in the habit of loading barges. I don't know anything about their loading part, but I know when they are fitted to carry a load. I would object to putting a load on the barge "Columbia" after we got through with her, a load to go to Astoria.

Q. My question is, do you know what ought to be a proper load?

A. No, I don't know about the tonnage or the like of that; I don't know anything about what she ought to carry.

242 Cross-examination.

Questions by Mr. COTTON:

Q. What did I understand you to say about your objection to putting a load on the barge "Columbia"?

A. I would not put a load on her to go to Astoria after we got through with her, provided she was handled all right.

Q. That is the carrying capacity so far as register is concerned?

A. Yes, carrying a load in smooth water.

Q. The registered tonnage of that vessel, that is her floating capacity?

A. On smooth water.

Q. Anything that you think she could float she would be strong enough to hold up?

A. To carry a certain load; I would not want to overload her.

Q. By overloading you mean so that she would be so deep in the water that she would be unable to have buoyancy to carry her.

A. Certainly.

Q. How about her timbers?

A. I think that her frame was sufficient to carry a good load to Astoria after we got through with her. The beams are 20 inches apart, or whatever the frames are, and there is one across every frame, and she is stanchioned inside secure. I don't see why she should not carry a load as well as any other barge.

Q. She was in about the same general condition that barges and boats along the river are, was she not?

A. Yes, she was just about the average of those here at Portland.

243 Q. She was in the same condition as the general average run of old steamboats?

A. Yes, no better and no worse.

Redirect examination:

Q. What do you know about the condition of any other barges on the river?

A. I know about the other one that we worked on and the "Columbia Chief."

Q. No, I mean what other barges not belonging to the company.

A. I know one belonging to the Willamette Saw-mill Company, the "Ordway." I know what she is and I worked on her, helped to build her, and she was the same style of a barge.

Q. When you state that the barge "Columbia" was just about the same as the general average, no better and no worse, you refer to the condition of her timbers?

A. Her hull, yes.

Q. Do you know anything about what the condition of her timbers was?

A. I knew she would not be in a very bad condition; the beams in the upper part are generally the worst; those in the water generally last twice as long as those above the water.

Q. How did you know the beams in her were in good condition?

A. We cut them out of her.

Q. I understood you to say that you had nothing to do with the deck beams?

A. Certainly, the ends of the deck beams; all inside of that was sound.

Q. Did you cut all of the deck beams out of her?

A. Yes, sir, we cut all that were bad out of her.

244 Q. And how did you readily bolt the new on to the old?

A. We locked them in the inside, but the bolts that were in the original beams, of course, remained in the clamp and sheer strakes; those were all bolted when she was first built, and remained there.

Q. The point I make is, had you compared that barge with other barges on the river? I want to know whether or not you mean to say that this barge was of the same build or in the same condition as other barges on the river?

A. About the same build, yes; some of them are different, turned up at both ends; this has got a sharp bow on her; there are different kinds of barges; some are like a scow, turned up at both ends.

Q. Do you mean that the "Columbia" was of the same average build, or in the same average condition as other boats—which do you mean?

A. Of the same average build, and in about the same average condition.

Q. What do you know about the condition of other barges on the river?

A. Other barges that I worked on. I don't mean to say that I have any idea about barges that I was not on.

Q. What other barges have you been on?

A. On the "Ordway" and the "Atlas."

Q. And the others were barges of the company?
A. Some belonging to the company, yes, sir.

Recross-examination:

Q. You have worked on quite a number of old boats?
245 A. I have worked on mostly all of the boats that the company owns. I am working now on the "Thompson."
Q. You have worked on other boats for Stefen?
A. I have worked on all kinds of boats.
Q. You have worked in Mr. Stefen's yards for quite a while, have you not?
A. I worked on the "Victoria," the "Sea Home," on the "Ira Thompson" eight months when she was building, at the Dalles; I worked on too many to tell you.
Q. Most of the time you worked for Mr. Stefen?
A. For the last three or four years I have been working for Mr. Stefen; he does contract work because the company cut the wages down and I went on the outside.
Q. Now, you say that the top beams which you took out were more likely to wear by weather?
A. The rotten ends of the beams that we cut off get broken off, and we cut those all off; some places there would be three or four old ones put in for a substitute; that is, to protect the hold from the wharves we cut them off and replaced them all with new ones on the ends, and put in new guard-beams.
Q. Those were the deck beams?
A. Yes, sir; they were 20 inches apart.
Q. You say the ends of those are very likely to rot, are they not?
A. The deck beams are the first things that go.
Q. Judging from their condition, the rest of the barge was in good condition?
246 A. I don't say number one condition, but possibly fit to carry a load of wheat; that is what I say.
Q. It was about the same as the general average run of boats?
A. Most of them, after we get through repairing, could stand more, mostly all of them.

Questions by Mr. WOOD:

Q. You have already stated that you were not in charge of the work?
A. I was not in charge, no, sir, but I have had charge.
Q. You were not in charge of the work on the "Columbia"?
A. No, sir.
Q. You simply did what you were told?
A. I did what I was told.
Q. Did you ever make any special examination of her condition?
A. No, sir, I did not; I had no business to.

Questions by Mr. LORD:

Q. Do you know how long the barge had remained in the bone yard before the repairs commenced?

A. I don't know exactly; I just went to work on the 10th of October on the copper boiler, and I was taken from the copper boiler over on the barge. I don't know when she was laid off.

Q. Did you make any examination of the exterior or interior of the hull between the ends of the beams that you speak of and the water line?

A. No, sir; I had no business to.

Q. Are you familiar with the effect the warm water has upon a vessel riding without any load upon the top of the water?

A. Yes, sir.

Q. What would that effect be?

247 A. About the first thing that goes is the top, on account of the wind and water; right along the water line of the plank is generally about the first place that goes.

Q. You made no examination as to the barge "Columbia"?

A. No, sir, I did not.

Q. You don't know then as to whether or not the outside planks on the barge "Columbia" were in sound condition?

A. No, sir; I did not; I did not try them.

Q. They might have been quite unsound and you not know it?

A. They might, and they might have been sound and I not know it.

Q. Mr. Collins, is it customary to calk the seams in a vessel?

A. Yes, sir, if it wants it.

Q. To calk the seams after a vessel has lain for a long time without use?

A. Generally it is; generally a man goes and examines it to see if it wants calking.

Q. Do you know whether a man went and examined the barge "Columbia"?

A. I cannot tell you.

Q. Did you see any one calking the seams while you were there?

A. No, sir; I don't follow calking; I did not see anybody calking.

Q. That is customary, is it not?

A. They calk the upper strake of the transom, the upper piece that we put on, that ought to be calked. I know that was calked.

Q. But you did not go down the side?

A. No, sir, I did not see anybody do so. I suppose somebody surely examined it.

Questions by Mr. WOOD:

Q. Mr. Collins, you are in the employ of that company?

248 A. No, sir, not now. I am working for Mr. Stefen at contract work.

Q. When I spoke to you this morning out there in the room adjoining here did you not say that you considered there had not been enough repairs put on the barge "Columbia"?

A. No, sir, I did not tell you anything of the kind and you know it. I did not tell you anything of the kind.

Q. Didn't you say that there might have been a good deal more done to it?

A. No, sir; I did not. You want me to tell you what I did say?
Mr. WOOD: Yes.
The WITNESS: You want me to give you some points on that?
Mr. WOOD: Yes.
The WITNESS: I give nobody any points; only I tell the truth.

Excused.

EDWARD TACKABERRY, a witness on behalf of respondents, being duly sworn, testified as follows:

Direct examination.

Questions by Mr. WOOD:

Q. What is your business?
A. Steamboating.
Q. Where are you engaged at present?
A. I am not doing any business at present.
Q. Have you ever worked for the Oregon Short Line Company?
A. Union Pacific Company; yes, sir.
Q. Did you ever work on the "Ocklahama"?
249 A. Yes, sir.
Q. What is your position there?
A. Mate.
Q. How long have you been on the river?
A. About twelve years, I guess, off and on.
Q. In what capacity?
A. In various capacities.
Q. State when it was that the "Ocklahama" made fast to the barge "Columbia" to tow her down the river at the time this loss occurred.
A. Last October.
Q. What time of day?
A. About a quarter past one or half past one.
Q. Was the "Columbia" loaded when you came alongside of her?
A. Yes, sir.
Q. What was her condition as to being on an even keel or not at that time?
A. She was down at the stern some.
Q. And how as to any list, if any, you saw?
A. I did not take notice at the time, perhaps she had a little list, she might have been on an even keel at the time.
Q. Have you ever towed the "Columbia" before?
A. No, sir.
Q. State how it was made fast to the "Ocklahama;" what was the position of the two?
A. She was alongside, pretty well ahead of the boat, that is, about two-thirds ahead of the boat, I guess.
Q. And how was the barge made fast to the "Ocklahama"?
A. Alongside.
Q. I mean in what way?

A. You want the different numbers of lines that were out, the names?

250 Q. Yes.

A. There were four lines out, I think, or six—six lines.

Q. State how the "Columbia" behaved in towing down the river?

A. In taking her out of the bone yard she listed somewhat over to the port side in taking size.

Q. Did she keep the list? Just go on and describe how she behaved.

Counsel for petitioners objects on the ground that the question is incompetent and immaterial.

Objection overruled.

Q. State how she behaved and how she listed and what her general action was going down the river; will you state it in general, as short as you can?

A. She gave a list to port in knocking around, and after she got under head she gave a list the other way, that is, to starboard, and she carried that list until we got down to off about St. John, and we lengthened out the towline to see if that would not ease her up; it did not seem to help her any.

Q. Did she take any other list?

A. Not for some time afterwards.

Q. When did she take another list?

A. I believe the wheat was shifted in the barge to straighten her up, and she listed the other way after we got her on an even keel.

Q. Did the barge "Columbia" have any water in her hold?

A. Yes, sir.

Q. How much water had she down by the stern?

A. I should judge about a foot or eighteen inches.

Q. Did she carry that all of the way down or not?

251 A. Yes, sir.

Q. Did she have the usual quantity of water in the hold of a wooden ship, or more than the usual quantity?

A. That I could not say; I was not down to look at the water.

Q. What do you form your opinion then by, that she had water in the hold?

A. The captain of the "Ocklahama" was down in the hold.

Q. Captain Short?

A. Yes, sir.

Q. What did he say?

A. He said there was water there.

(Cross:)

Q. When was this?

A. After we left Portland; a short time after we left Portland.

Q. State how she behaved in taking a list from one side to the other, that is, your impression.

Counsel for the respondents objects to the witness being asked his impression, as he has stated the facts.

Objections sustained. Question withdrawn.

Q. Describe the manner in which she changed in listing from one side to the other, and whether or not you could ever get her to ride on an even keel; just describe it?

A. Under the circumstances I don't think it was possible to make her stay on an even keel.

Q. Why not?

A. On account of the water that was in the barge.

Q. How much wheat would it take, if you know, to cause her to lisp from one side to the other, to change the lisp?

A. I don't know.

252 Q. Didn't you see it done on the barge?

A. No, I did not see it, still I knew it was being done at the time on the way down the river.

Q. On your way down?

A. Yes, sir.

Q. Do you know about how much wheat was moved in order to cause the list?

A. No, I do not.

Q. How many hatchways did she have in her?

A. I don't know that.

Q. Did she have a forward hatch?

A. She had a small hatch forward.

Q. What was the size of it?

A. Eighteen by ten, I think it was.

Q. Did she have any pumps?

A. She had one pump, I think.

Q. Where was it located?

A. It was inside of the house.

Q. And in what part of the boat, as to being fore or aft?

A. Pretty well forward.

Q. What kind of a pump was it?

A. I did not take any notice of it; just an ordinary hand pump, so far as I know.

Q. What time did you arrive at Astoria?

A. It was twelve o'clock or a little before.

Q. Of what day?

A. The 21st of October, 1892.

Q. What kind of a night was it?

A. It was not a very dark night; it was dark, but it was not cloudy.

Q. Was there any moon?

A. No.

Q. Could you give about the hour that you reached the dock at Astoria, the time that the accident happened?

A. It was just shortly before twelve; I did not take notice of the time.

253 Q. How was the tide at that time?

A. The tide, I think, was flooding.

Q. How would the current of the river be then at that time?

A. That I could not state.

Q. What I mean is, would the tide or current of the river be the stronger; which way would the water be flowing?

A. It would be flowing upstream.
Q. Was there any light on the dock as you approached it?
A. I did not see any; I was called just shortly before we got there.
Q. You did not see any light there?
A. No, sir.
Q. Now describe what you know, of your own knowledge, of the collision with the dock and how it happened.
A. I just came on deck, just as we were almost to the dock.
Q. How far away from the dock?
A. We might have been two or three or four lengths, or something; perhaps more.
Q. In what position on the boat were you; what part of the boat?
A. I just came out from the cabin forward—that is, the upper deck.
Q. And where were you standing then?
A. Forward.
Q. On what deck?
A. On the upper deck.
Q. Now go on and describe what you know and what you saw.
A. I did not pay much attention to the boat coming in, just merely felt her——
Q. (Interrupting.) You did not notice anything particularly until you felt the shock?
A. No.
Q. Was the shock a severe one or not?
A. No, nothing more than a great many boats get.
254 Q. What kind of a blow was it on the dock to the direction which it was given?
A. I don't know; I would have to guess at that.
Q. Were you coming head on to the dock?
A. Right head on?
Q. Yes.
A. No, sir.
Q. Were you coming from upstream?
A. Coming from upstream.
Q. And at about what angle to the face of the dock?
A. Almost at right angles.
Q. Almost at right angles to the face of the dock?
A. Yes, sir.
Q. Would not that be head on to the dock? I presume I do not understand you or you do not understand me.

COURT:

Q. Going right into the line of the dock?
A. About in this shape (indicating). (Witness hands counsel diagram.)
Q. When you say that you were coming about right angles to the face of the dock, what do you understand to be the face of the dock?
A. What I mean is that the dock was lying up and down stream.
Q. The dock was lying up and down stream. And about how

did you approach that? Coming head on or coming obliquely, glancing?

A. The same as the diagram.

Mr. WOOD: But I cannot get this in the record of the stenographer very well. That is the trouble.

Q. You did not come right head on into the dock?

(No answer.)

255 The COURT: You can pin that diagram to the deposition as the diagram that the witness makes.

It is stipulated by counsel that the angle indicated by the witness is about ten or fifteen degrees.

Q. (Indicating on diagram.) Which would be the line of the boat and which the dock?

A. The shorter line would be the boat and the longer line the dock.

Q. Were there any piles outside of the dock?

A. Fender piles.

Q. How were they in relation to the dock itself? Are they a part of the dock or fixed to it?

A. Fender piles are merely fenders for the dock.

Q. Were they fastened to the dock?

A. Yes, sir.

Q. Were there particular ones fastened to the dock?

A. No, sir, I don't think so.

Q. How did the barge affect the piles and the dock where it struck?

A. I did not take any particular notice. It seemed to spread two or three piles, spread them one side; that was all.

Q. Which was nearest the dock, which was on the inside, the barge or the "Ocklahama"?

A. The "Ocklahama" was on the inside of the barge; that is it would be lying alongside of the dock.

Q. The "Ocklahama" was lying next to the dock?

A. Yes, sir.

Q. You have stated already, but I wish you would repeat it, describe the character of the blow again; state whether it was a direct or glancing blow and with how much force it struck?

A. It did not seem to me—at least I did not notice it much.

256 Q. After the accident state what was done by yourself and those on board the "Ocklahama"?

A. I did not know that anything was wrong until I went forward on the barge.

Q. On the barge?

A. Yes, sir.

Q. And what did you find then?

A. There was just a line put out and it was held there for a few minutes before anything was said.

Q. And then what was said or done?

A. The captain of the barge sent the watchman down I believe to see if it was hurt any below.

Q. The captain sent the watchman down into the hold of the boat?

A. I don't know whether he went into the hold or not; the captain sent him inside.

Q. What did he report?

A. He came back and said it was leaking; he made the remark that water was coming in lively; that was the remark he made.

Q. Then what was done?

A. We lay there quite a while; there was some talk of unloading there, beaching or doing something.

Q. Between whom was this talk?

A. Between Captain Short and Ferguson.

Q. At this time was there anybody on the dock?

A. I saw a watchman on the dock.

Q. When did he come out?

A. That I did not take notice of; he might have been there all of the time.

Q. Was the agent, Mr. Lounsberry, there?

257 A. No, sir; not at that time.

Q. What was decided then as a result of this talk between Captain Short and the master of the barge?

A. The captain of the barge wanted to have her; first he wanted to unload and then he wanted to beach her out on the sands and they came to the conclusion that they would put her on the inside of the dock.

Q. Was that the dock where she was to have been unloaded?

A. The barge, I believe, was intended to go alongside of the vessel.

Q. Then what did you do after this? Did you leave this position at the outer dock?

A. Left that; yes, sir, and went on the inside.

Q. About how long was this after the accident that you moved her around?

A. Probably half an hour.

Q. And then what did you do?

A. I went on the inside, I think word was sent to Mr. Lounsberry there.

Q. Who is Mr. Lounsberry?

A. He is the Union Pacific agent at Astoria.

Q. And what did you do with the barge?

A. Put her alongside of the dock on the inside; they were working there and Mr. Smith, the engineer of the "Ocklahama," was getting ready to use a siphon and as soon as Mr. Lounsberry came he went down to get the steam hose.

Q. Went down where?

A. Downtown, at Astoria.

Q. About how long was it then before he got the hose?

A. I could not say; he was gone quite a little while.

258 Q. He did not start until Mr. Lounsberry came?

A. No, sir.

Q. What was being done on board of the barge and the "Ocklahama" meanwhile?

A. Not much of anything.

Q. Where was the "Ocklahama" at this time?

A. Alongside of the barge still.

Q. Where was the barge in relation to the dock?

A. Right alongside of it.

Q. Now state what was done after Mr. Smith got back with the hose?

A. They rigged up the hose and tried to get the siphon to work, but the siphon would not work for some cause or other, there was wheat in the hold, or something.

Q. About how long a time was consumed in experimenting?

A. I could not make an estimate of the time at all.

Q. Which way was the barge listed at this time, if at all?

A. I think she was listed towards the dock.

Q. And away from the "Ocklahama"?

A. Yes, sir.

Q. Did you hear Mr. Smith, the engineer, give the master of the barge any instructions in regard to correcting the position of the barge?

A. I did not hear Mr. Smith say so, but the captain of the barge came to me and said he wanted my men to shift the wheat and put the barge on an even keel, so that the siphon would take water.

Q. Who gave that order, if you know?

259 A. That I could not say; he said that Mr. Smith, the engineer, wanted the barge on an even keel.

Q. So that the siphon would work?

A. Yes, sir.

Q. State, Mr. Tackaberry, what was done after Mr. Smith got his siphon finally rigged.

A. It was working for some little time.

Q. About how long a time?

A. I did not pay any attention to the time; I could not judge of the time; it did not appear to take water; for some cause or other it did not work.

Q. In your judgment, how long was it after you got around to the inside of the dock until the barge collapsed?

A. I should judge about three hours.

Q. Describe the final catastrophe, the breaking up of the barge just how it occurred as far as you know about it yourself. Where were you at this time, at the time the barge turned over?

A. I was on the guard of the barge at the time she turned over.

Q. Go on and describe what you know about her at this time.

A. I went down on the guard of the barge, making the line fast; that is, giving the watchman the line at the time she was turning; she was turning some little time before we noticed.

Q. Making the line fast to what?

A. From the wharf.

Q. From what?

A. From the barge.

Q. Go — and describe the events just as they occurred.
A. I did not know that it was turning at the time until I heard some of the boys hollering that she was going, turning over, and then they began to call for Captain Short to come out.
260 Q. What happened then?
A. Everybody got out as soon as they possibly could.
Q. What happened then as to the barge and the wheat?
A. She went almost over on her beam ends; that is, very near over.
Q. Did she go suddenly or not?
A. She went pretty fast after she got started once.
Q. How long before this turning over happened, had the shifting of the wheat on the barge ceased; that is, I mean the shifting that was done to bring her on an even keel?
A. A half an hour perhaps; it may have been longer.
Q. Where was Captain Short, if you know, at the time the barge turned over?
A. I don't — where he was at the time she turned over.
Q. Where did you last see him?
A. The last I saw of him he was in the hold, right forward in the barge.
Q. Do you know what he was doing?
A. Building a bulkhead.
Q. For what purpose?
A. To stop the water.
Q. Do you know where the barge was injured; what damage was done her by the collision?
A. All that I could see was the stem was broke off, I believe, damaged slightly.
Q. Did you see that from the inside or the outside?
A. No, you could see it from the outside.
Q. Describe what kind of a break it was.
A. I just merely noticed it; it seemed as if the stem was broken off.
261 Q. Did you notice what kind of wood the stem seemed to be as to soundness?
A. I did not notice that.
Q. When the barge keeled over describe what happened to the wheat.
A. It was mostly under water.
Q. Did any of it go into hatchways?
A. Yes, sir.
Q. Describe that; describe how it looked, how it happened, how it was done.
A. I could not see anything of the hatch after the barge turned over; in fact, we did not see anything until the next day.
Q. Because of the darkness or because the wheat covered it up?
A. The wheat covered everything up.
Q. What was the condition of the tide at the time the barge broke up?
A. I think it was ebb tide.

Q. Do you know what the character of the river bottom is at that particular place?

A. It is soft, mushy.

Q. Did you see her next morning after the accident?

A. Yes, sir.

Q. Describe how she was lying in reference to the dock.

A. She was lying quite a piece off from the dock, over on one side, the house all smashed; that is, lying down.

Q. How was she broken, if at all?

A. There seemed to be a portion of the hull torn loose from the bottom.

Q. (Handing witness photograph.) Is that a correct photograph of her position?

A. Yes, sir, about high water I should think, almost high water.

Q. (Handing witness another photograph.) How is this?

262 A. That was taken at low water I should judge, almost low water; I guess it is low water.

Counsel for respondents offers the two photographs in evidence.

The same are received without objection and marked "Exhibit 3 and 4."

Q. The next morning after the accident did you see any evidence of rottenness in the barge?

A. No, I did not take any notice at the time.

Q. Did you make any examination?

A. No, I did not.

Q. Did you ever at any time make any examination?

A. I just noticed the stern end of the barge; it seemed pretty soft, rotten.

Q. What particular timbers?

A. It just seemed to be around the ends of the plank; that is of the transom.

Q. In navigating the Columbia river with lighters and steamboats, such as the "Ocklahama," do they ever get on sand banks and bars and get aground?

Counsel for petitioners objects as immaterial and incompetent.

Objection sustained. Respondents except.

Q. In the navigation of the Willamette and Columbia rivers with these lighters and steamboats, do they ever get on sand bars or take the ground?

Mr. COTTON: The witness has testified that he never towed a barge before if I recollect correctly.

(Cross:)

Q. Did you ever tow any of these barges before?

263 A. Not before I was on that boat. I have never seen any barges on bars; no.

Q. What I ask is, whether in the river they ever get on bars?

A. I have only heard of one case.

Q. Is it ever customary as a matter of necessity to beach a barge or steamboat in these rivers?

A. I guess they do in some cases; we never look around.

Q. Didn't you say in your examination a little earlier that in discussing the situation one of the propositions was to beach the barge?

A. Yes, sir.

Q. Suppose you were to run into a snag in the middle of the river and knock a large hole suddenly in the bottom of any barge or boat, what would you do?

A. It would be necessary then to beach the barge.

Q. From your knowledge of the barge "Columbia" and the load that she had on her and your examination of her after the accident, state whether if the water had left her so that she took the ground there whether or not, outside of the question of collision, she would have supported her load on the ground, taking the bottom?

A. I don't think she would.

Q. Where was the deck hand Peterson at the time of the accident?

A. He was in the hold with the captain, Captain Short.

COURT:

Q. Was Peterson killed?

A. Yes, sir.

Q. How long had they been down there when the accident occurred?

264 A. Peterson had been down there I guess twenty minutes or more.

Q. How long had the captain been there?

A. Fully an hour, I guess; that is, he had been up two or three times meantime.

Q. And if there had been a forward hatch of any size or dimensions, reasonable under the circumstances, on the barge "Columbia," in your opinion could Captain Short and Peterson have been saved?

Counsel for respondents objects as incompetent.

Objection withdrawn upon permission being granted by the court to cross-examine witness upon the same matter.

A. I think they could.

Q. Where were these men when you last saw them, dead?

A. I did not see Mr. Peterson when he was taken out; he was taken out in the evening and Captain Short in the morning.

Q. Didn't you see either of them?

A. I saw Captain Short; yes, sir.

Q. Where was he?

A. Just a little above the hatch.

Q. What way do you mean by above, fore or aft?

A. Inside of the house, coming up through the hatch that he went down in jammed in the wheat.

Q. I don't understand what you mean by saying he was found a little above the hatch?

A. What I mean is a little above the deck.

Q. He was partly out of the hatch, is that it?

A. Yes; he was partly, I think, above the hatch, this is, the deck.

265 COURT:

Q. Had he partly emerged from below?

A. Yes, sir.

COURT:

Q. And was partly above the deck?

A. I think so, I can't tell exactly, I should judge so.

Q. And then the wheat was on him; is that it?

A. Yes, sir.

Questions by Mr. LORD:

Q. Who was on the "Ocklahama" as deck hand at the time of coming down on the Columbia river, October 21st, last?

A. William Boyce.

Q. This gentleman here?

A. Yes, sir; Mr. Peterson.

Q. When you approached the dock at Astoria state whether or not there was any light on the dock or anything attached to the dock.

A. I could not say; I did not notice any and was not looking for anything upon that.

Q. Did you see any light upon the "Wallowa"?

A. I did not.

Q. Would you have seen it if there had been a light there?

A. I was not looking for anything like that and did not know she was there at the time.

Q. Who was on the deck of the barge at the time the barge collided with the dock?

A. I just got up; I think all the deck hands were forward on the barge.

Q. Forward on the barge?

A. Yes, sir.

Q. Did you see Mr. Boyce at that time?

A. I did not see him until after I went out on the barge.

Q. Where was he at that time?

A. He was forward, I think.

266 Q. Forward upon the tug or barge?

A. Upon the barge.

Q. What was he doing there?

A. I could not say what he was doing at the time.

Q. Where did you see Mr. Boyce at the time of the collision with the dock?

A. I did not see him; I just came out; he was forward, I think,

on the barge; they were all out there, I think; all hands, ready to make her fast?

Q. How long after the collision with the dock was it before the boat was taken around to the slip?

A. I guess it was half an hour or such a matter.

Q. Did they tie up to the dock?

A. They merely had a line out to hold her there for the time being.

Q. Who passed the line out, do you recollect?

A. That I could not say; Mr. Boyce generally used the line.

Q. If there was any line passed out that night, Mr. Boyce passed it, did he?

A. I guess he did; he usually did so.

Q. It was during that time that Captain Short went into the barge to ascertain what had been injured, was it not?

A. Captain Short did not go down at that time.

Q. Did any one go at that time?

A. The watchman of the barge was sent down to look.

Q. Who was he?

A. I don't know what his name was?

Q. Were you present when he made his report as to the condition of the barge?

A. He came back and said that the water was coming in
267 pretty lively, or words to that effect, and at that time Captain Short told me to go down and see.

Q. Did you then go down?

A. Yes, sir.

Q. What did you discover?

A. I went down and went in as far as I could; it was timbered up forward, just braced, cross-braces, and such as that; I could not get clear in to where the leak was. I came in and told him it was leaking but I did not think it was very serious.

Q. You thought it was very serious?

A. I did not at that time.

Q. How much water was there in the hold at the time you went down?

A. What water there was was in the stern; I did not go back in the forward part.

Q. How did you get down, through the hold of the barge?

A. No, I went in the house.

Q. Just about the midships?

A. No, inside of the house a little piece.

Q. About what rate of speed should you judge the barge and tow were going at the time you came out of the cabin?

A. I did not take any notice of that at all.

Q. How far away from the dock were you at that time, when you came out of the cabin?

A. It was perhaps two or three lengths of the boat or such a matter.

Q. And how fast do you think you were going at that time?

A. I could not tell anything about it because I was not paying any attention.

Q. Could you see the dock?

A. I could see the dock; I was not paying any attention as to how the landing was being made at all.

268 Q. Did you hear any one speaking about the speed while you were standing in front of the cabin door?

Counsel for petitioners objects.

Objection sustained.

Q. During the time of the collision was the "Ocklahama" attached to the barge "Columbia"?

A. Yes, sir.

Q. At what time were they separated?

A. They were not separated until the time the barge turned over.

Q. Until that time, or after that time?

A. Just after that time.

Q. How were they separated?

A. There were two or three of the lines that parted, and then I believe one of the lines was cut.

Q. That was when she was turning over, was it not?

A. Yes, sir.

Q. Did the barge "Columbia" have any motive power of its own?

A. No, sir.

Q. Was there a pilot in the barge "Columbia"?

A. There was a captain and watchman.

Q. But the steering and the guiding power, the motive power, was from the tug "Ocklahama"?

A. Yes, sir.

Q. State whether or not the uncertain list of the barge "Columbia" in going down river would have a tendency to impede the proper steering of the tug and tow by the pilot; would that affect the steering or management of it?

A. It would have, it was listing one way or the other all the time; if she had set one way it would not have interfered a great deal.

269 The COURT: There is not the slightest allegation in the pleadings as to any negligence in the matter of steering.

Mr. LORD: I will give notice to the court at this time and to counsel for respondents, that I shall take the position in the argument of the points of law before this court that the overloading of the barge practically induced the collision, and that by reason of the want of care upon the part of the managers of this vessel, the injury resulted, and I will contend for that proposition to the end.

Q. State whether or not the wheat was not continually shifted from one side or the other during the voyage from Portland to Astoria, Oregon, in order that the boat might be kept from going from one side to the other?

A. It was; yes; after we left Portland here until about the mouth of the Willamette, or maybe further, for all I know.
Q. Was it not shifted after that time?
A. It may have been, I was not on watch.
Q. You were not on watch?
A. I was on watch at that time in the pilot-house.
Q. Do you know whether the barge was listed when she approached the dock, when you came out of the cabin?
A. She was listed.
Q. Which way?
A. Listed to port.
Q. About how much should you judge, could you see?
A. She had a pretty fair list.
Q. Do you know anything regarding the seaworthy condition of this barge, and if so, what?

Counsel for petitioners objects as incompetent.

270 The COURT: The witness may answer subject to the objection.

A. I don't know anything about the barge as to her seaworthiness or anything about it at all.
Q. Did you see Mr. Boyce at any time after he had come out of the hold after the barge had turned over, and if so state under what circumstances?
A. Yes, I saw him shortly after the barge turned over.
Q. Where and under what circumstances?
A. The first I saw him was on the wharf; then he stated that his arm was hurt.

The COURT: You need not state what he said.

Cross-examination.

Questions by Mr. COTTON:

Q. Mr. Tackaberry, you testified, did you not, before the coroner's inquest?
A. Yes, sir.
Q. How long did it take you to run from Portland to Astoria on this occasion?
A. We left at one o'clock, a quarter past one or something like that, and was there a little before twelve.
Q. And about what time did you say the final collapse took place?
A. I think about three o'clock, maybe half past three.
Q. Do you know how long after you struck the dock that you went behind it—about half an hour?
A. I think we laid on the outside fully half an hour before we headed around; it might not have been so long and it might have been longer.

271 Q. Then you were behind the dock about how long?
A. I was there from perhaps one o'clock.

Q. You were there from about a quarter of one till a little after three, were you not?

A. It may have been that time; yes, sir.

Q. How long did it take you to get around behind the dock?

A. From the time I left the outside it did not take a great while, maybe ten minutes, perhaps fifteen. I did not take account of the time; I did not notice the time or anything about it.

Q. When you got down to the dock did you go down in the hold, do I understand you to say?

A. I was in the hold; yes, sir.

Q. After you got behind the dock?

A. Yes, sir.

Q. How much water did you find beneath the hatchway then?

A. I forget how much; there was some little water.

Q. Just what was running back from the leak, was it not?

A. No, I think it was level water.

Q. Did Mr. Lounsberry or the engineer say anything to the captain about the condition of the boat?

A. I heard Mr. Lounsberry and Captain Short talking several times.

Q. Did you hear Mr. Lounsberry say anything to Captain Short about coming out on deck?

A. I heard him calling for him, yes, at the time the barge was turning over.

272 Q. Didn't you hear the engineer say something to Captain Short long before this?

A. I don't remember.

Q. Wasn't it five minutes before the barge turned over, after Mr. Lounsberry or the engineer told Captain Short to come out on deck?

A. No, sir.

Q. Didn't you so swear at Astoria?

A. I don't think I did.

Q. Didn't you swear this at Astoria, at the coroner's inquest on October 22d, 24th and 25th: "After that she kept listing; she was making water all the time and Ferguson shifted the wheat to port, because she had a list, in order to straighten her up. After that she kept listing more and going down, and then the engineer called out to the captain, as did also Mr. Lounsberry, to come up on deck; the captain and the deck hand being in the hold. I was out on guard of the barge and did not see much more until the barge turned over. It was fully five minutes from the time the engineer notified Mr. Lounsberry that he would not go into her hold until she keeled over." Did you swear to that?

A. I don't remember anything about that.

Q. How many times did Captain Short come out on deck when she was lying there in that position?

A. I don't know how many times he was out; he was out a number of times.

Q. When you first came behind the dock you were listed toward he dock, were you not?

A. Yes, sir.
Q. And when you turned over or broke down, which way were you listed?
A. Listed away from the dock.
Q. What caused the change of the list?
273 A. The shifting of the wheat.
Q. Who shifted the wheat?
A. It was done according to Captain Ferguson's order.
Q. Who was Captain Ferguson?
A. He was captain of the barge.
Q. After she took this list, was she turned over much to one side?
A. Yes, she had quite a list.
Q. The house began to bulge out first, didn't it?
A. I don't remember whether it did or not.
Q. Did not the sides of the house, the upper part of it, begin to bulge out before she broke down?
A. I don't remember whether it did or not.
Q. You don't remember that?
A. No.
Q. You say you came out of the cabin right before you got to Astoria. Where had you been before that?
A. In bed.
Q. Do you say the "Ocklahama" was between the barge and the dock at that time?
A. Yes, sir.
Q. On what side of the "Ocklahama" was the barge going downstream?
A. On the starboard side.
Q. On the starboard side of the "Ocklahama"?
A. Yes, sir.
Q. On the Washington side of the river, isn't it?
A. Yes, sir.
Q. On the Washington side of the river going down?
A. Yes.
Q. You are sure about that?
A. I think so.
Q. That is, when the "Ocklahama" was headed downstream the barge was on the right-hand side of the "Ocklahama"?
274 A. On the right-hand side, yes, sir.
Q. You are sure about that?
A. Yes, sir.
Q. How much ahead of the "Ocklahama" was she?
A. She was two-thirds of her length, I think.
Q. Do you know what she struck besides any piles down at Astoria?
A. No, I do not.
Q. You don't know whether she struck upon a pontoon or not?
A. No, sir.
Q. Did Mr. Smith, the engineer, come out of the hold of the barge at any time?
A. I think he was down, yes.

Q. What did he say when he came out on deck?
A. I don't know what he did say.
Q. Didn't he say he did not think it was safe to be in there?
A. He may have made some remarks, but I did not pay any attention.
Q. Didn't you hear him say that?
A. He may have made some remarks.
Q. Don't you know that he did say that?
A. I would not say positively whether I did or not.
Q. Don't you recollect that he did say it?

Counsel for respondents objects as immaterial.
The COURT: This may be taken subject to the objection.

A. No.
Q. Did Mr. Lounsberry say anything to you about its being unsafe?
A. I don't think he did.
Q. You say you remember one case when a barge or something went on the bottom? What case was that?
A. Went aground?
275 Q. Yes, went aground on a bar. You said you remembered some case?
A. That was the question Mr. Wood asked me.
Q. Yes?
A. That was the barge "Autocrat" here a few years ago that put me in mind.
Q. What happened to her?
A. I believe she lay there some time.
Q. They raised her finally, did they not?
A. I think they did.

(Redirect:)

Q. Who is Mr. Lounsberry?
A. Agent at Astoria for the Union Pacific.

Excused.

B. R. PEGRAM, a witness called on behalf of respondents, being duly sworn, testified as follows:

Direct examination.

Questions by Mr. WOOD:

Q. Captain, what is your position with the Union Pacific system?
A. Superintendent of water lines.
Q. Did you give the order for the "Ocklahama" to take the barge "Columbia" down the river the 21st day of October last, the time this accident happened?
A. I think so, yes, sir.
Q. Do you remember what your orders were as to when she should be back in Portland?

A. I don't remember that.
Q. Do you remember whether or not you ordered she should go down with her lighterage and immediately turn around and come back to Portland?
A. Very likely, I don't remember.
276 Q. Do you remember whether or not you had another job for her on hand and you wanted her on hand the next day, and that you wanted her to hurry back?
A. I don't remember.
Q. Have you a letter of appointment, appointing you to your position here?
A. Yes, sir.
Q. Are these two letters the documents?
A. Yes, sir; the letter and circular. (Witness hands counsel papers.)

Counsel for respondents offers the same in evidence.
Counsel for petitioners objects as immaterial, irrelevant and incompetent.
The COURT: What is the purpose of your offer?
Mr. WOOD: To show Captain Pegram's authority in the matter.
Mr. COTTON: I object to them. If there are any admissions of liability or admission of facts in them, they are merely hearsay, and an agent of a corporation is not employed for the purpose of making admissions. If there are no admissions in them I do not think they are material.

Q. You have the same authority and had at the time the "Columbia" went down, that you had when this letter was first issued?
A. Yes, sir.

Papers are admitted and marked "Exhibits 5 and 6."

Cross-examination.

Questions by Mr. COTTON:

—. Captain, you report to Mr. Baxter, from time to time, do you not?
A. Yes, sir.
Q. And receive orders and suggestions and instructions from him?
A. Yes, sir.
277 Q. And did at the time the barge "Columbia" went down?
A. Yes, sir.
Q. Mr. Baxter occupied what position?
A. Superintendent of the railroad.
Q. And resided here in Portland?
A. Yes, sir.
Q. Did you receive any instructions from Mr. Baxter in relation to the barge "Columbia"?
A. No, sir.

Q. As a matter of fact, Captain, do you ever report to Mr. Baxter as to the loading of barges or the equipment or repair of barges?
A. Not unless it is something extraordinary.
Q. Are you not the heads of two separate departments, he of the railroads and you of the water lines?
A. Yes, but I am subject to him, he is my superior officer.

(Recross:)

Q. Did you, or not, consult with Mr. Baxter about the repairs of the "Columbia"?
A. I don't know.

(Recross:)

Q. You don't remember?
A. I told Mr. Baxter.

Excused.

ALFRED C. SIMMONS, a witness called on behalf of respondents, being duly sworn, testified as follows:

Direct examination.

Questions by Mr. WOOD:

—. Mr. Simmons, what is your business or occupation?
A. Steamboating.
Q. Were you on the "Ocklahama" last October at the time of this disaster?
A. I was.
Q. In what capacity?
A. Night watchman on the "Ocklahama."
278 Q. Night watchman?
A. Yes, sir.
Q. What time did you go on duty?
A. Sundown.
Q. Were you on duty at the time the accident occurred at the dock at Astoria?
A. Yes, sir.
Q. About what time was that?
A. Between eleven and twelve o'clock, to the best of my knowledge.
Q. What kind of a night was it?
A. It was a rather dark night.
Q. Was it cloudy?
A. No, I don't think it was cloudy, but it was dark; there was no moon.
Q. Was there any rain or fog?
A. No, sir; I think not.
Q. How was the tide at the time you approached the dock?
A. I think the tide was flood.
Q. How was the "Columbia" fastened to the "Ocklahama"?

A. Fast alongside a little forward of the "Ocklahama."
Q. On which side of the "Ocklahama"?
A. The starboard side.
Q. As you approach the dock in Astoria did you approach obliquely or head on?
A. It was head on; it was kind of glancing.
Q. Where were you just at the moment preceding the collision with the dock?
A. I was on the upper deck.
Q. What part of the upper deck?
A. Right forward of the pilot-house.
Q. How much of a shock or blow was the collision?
279 A. It hit a pretty good lick.
Q. Did it do any damage to the dock?
A. Not that I know of; no, sir; I did not examine close.
Q. Did you see the dock the next morning?
A. No, sir; I did not.
Q. When did you come back from Astoria?
A. We went down Saturday morning and came back Saturday night; I left there that evening—the next evening rather.
Q. Then you were there all day?
A. Yes, sir.
Q. And you say you did not see the dock?
A. No, sir.
Q. Did you see the wreck of the "Columbia"?
A. Yes, sir.
Q. By daylight?
A. Yes, sir.
Q. How far was she lying from the dock?
A. She was lying alongside of the dock?
Q. How close to it?
A. She was made fast to the dock before the wreck; she collapsed from the dock outward about 6 or 8 or 10 feet, I guess; perhaps that far.
Q. How long have you been on the river as a riverman?
A. Seven or eight years.
Q. State what was done now just after the collision happened?
A. As soon as she struck the dock the captain told me to go forward on the barge and see what damage, if any, was done. I went forward and found out that the water was running in the hold and I went back and told him so. He then went on the barge himself;
he was there, I suppose, several minutes, perhaps half an
280 hour, and he took her around on the inside of the dock and made her fast there.
Q. And then what was done?
A. He went down in the hold to build a bulkhead or something to stop the leak.
Q. How long after you got around the inside of the dock before he went down in the hold?
A. I don't suppose it was long; I could not say as to how long it was.

Q. You went down with him into the hold?

A. I guess there were several; I was down in the hold for one; I can't say who all went down.

Q. Did Peterson go down with him?

A. I guess he did.

Q. When did Mr. Lounsberry, the agent of the company, appear?

A. It was after we got around on the inside of the dock.

Q. About how long afterwards?

A. I could not say, I think they sent after Mr. Lounsberry in about a half hour; I could not say how long, but I know it was after they got on the inside of the dock.

Q. About what was the difference in level between the guards of the barge and the guards of the "Ocklahama" when they were lying inside of the dock?

A. The barge was below the "Ocklahama," I don't know exactly how much.

Q. Could you give a guess at it?

A. No; I don't know.

Q. Now, what was done about attempting to pump the "Columbia" out, just describe.

281 A. They were looking to see about it; the engineer, I know, went off downtown, he and Mr. Lounsberry, and got a steam hose to pump her out with, but it did not work smoothly or did not get to work anyway, when the collapse took place.

Q. Do you know anything about the shifting of the wheat on the "Columbia" after she got around on the inside of the dock, to bring her on an even keel?

A. Yes; I saw them shifting the wheat.

Q. Who was doing it?

A. The captain of the barge.

Q. Who else?

A. I could not say who was helping, perhaps the watchman of the barge; I did not notice just who was helping.

Q. How long did this go on; how much wheat was shifted?

A. I could not say as to that.

Q. Do you remember how long a time it occupied?

A. No, sir.

Q. How long was it stopped before the collapse took place?

A. To the best of my knowledge about half an hour; I could not say for sure.

Q. When you were in Portland, just before you started on this trip, was Captain Pegram on board the "Ocklahama"?

A. He was.

Q. Did you hear him give any orders about taking the barge down and bringing her back?

A. I did.

Q. What were they?

A. He ordered Captain Short to go to Astoria and come back as soon as possible, to be back next morning if possible, and have the ship ready to go down.

282 Q. Did you take any notice of the condition of the barge after the collapse the next day?

A. Very little, not much.

Q. State if you observed whether there had been any repair-work done on it or any new work?

A. I did not notice very much; no, sir.

Q. Did you see any that had been done below water line?

A. No, sir; I was not below the water line.

Q. Where did the barge seem to split or go to pieces, about along what general line?

A. It was two or three feet below the guard that I noticed, to the best of my recollection, where the crack was, she split open.

Q. Did you see any rotten wood or timber in the barge?

A. Yes, sir; a little.

Q. Where.

A. In the ribs, along about this line, where it would break off once in a while; you could see that one of the timbers was quite rotten, one of the ribs.

Q. In navigating the Columbia river, is it anything unusual for a steamboat or barge to have to be beached or to take the bottom?

Counsel for petitioners objects as immaterial and irrelevant.

Objection overruled.

A. It is sometimes, I should think, on the Columbia river.

Q. How about in the Willamette?

A. I have known quite often there for boats to be beached on account of very low water there, though.

283 Q. Is the beaching of a barge, or one of the towboats or steamboats, or its getting aground on a bar, or getting aground in some way, a thing to be expected in the course of navigation?

A. Along the Willamette they don't pay much attention to a boat going aground.

Q. Where were you at the time the collapse occurred?

A. I was on the barge until I thought she was going to collapse and I jumped from her on the "Ocklahama."

Q. Do you know what the state of the tide was at the time the accident happened?

A. I think it was ebbing at the time, I would not say for sure, but that is my impression.

Q. Did you see any light on the dock at Astoria, as you approached it?

A. I did not.

Q. When was the last time that you saw Captain Short and Mr. Peterson?

A. It was in the hold of the barge.

Q. After they were dead?

A. No, sir, I saw Captain Short after he was dead; he was in between the wheat when they took him out; that was the last time I saw him.

Q. Can you describe just where he was and how he was lying?

A. I could not tell exactly what part of the barge he was in, but I know he was in between the wheat; the wheat had caught him.
Q. Was the barge on the bottom at the time she broke up?
A. Yes, sir.

Questions by Mr. LORD:

Q. About what time of night did this collision occur with the dock?
284 A. Between eleven and twelve o'clock.
Q. You have no particular way of fixing the exact time?
A. Yes, I could have told, but I never thought of it at the time.
Q. Where was Mr. Boyce standing when the barge and tug approached the dock?
A. I could not say.
Q. Where were you at the time of the accident?
A. I was on the upper deck of the "Oeklahama."
Q. Was any one sent forward with a line to throw to the dock?
A. Yes, some one was sent forward, and the captain of the barge was forward, but I don't know who was with him.
Q. How high a rate of speed were they approaching the dock, say when they were two or three boat-lengths from the dock?
A. I could not say exactly as to that.
Q. State it as near as you can.
A. I could not say exactly what rate she was going.
Q. Were they going at a rapid rate in approaching the dock?
A. No, not at a very rapid rate; she was stopped some lengths from the dock.
Q. She was stopped?
A. Yes, sir.
Q. The engine was stopped; he did not stop the boat, did he?
A. He stopped the engine, not the boat.
Q. The momentum carried them very smoothly through the water until they approached the dock. Now, what I want to know is how fast they were going when they were about three boat-
285 lengths from the dock, that is, were they going faster than ordinary in approaching the dock with a heavy load on like that?
A. No, I should think not.
Q. Then how did it occur that they collided with the dock if they were not going faster than ordinary—how was it they struck the dock if they were not going faster than usual?
A. That is something I don't know.
Q. How did they happen to collide with the dock?
A. To the best of my knowledge, it was on account of the "Wallowa," the tug.
Q. What has that got to do with it?

Mr. COTTON: I object. The fact was that she hit the dock. How hard she hit it or anything pertaining to it may be material, but I do not think the "Wallowa" had anything to do with it.
Objection sustained.

Q. How hard did they strike the dock?
A. They struck the dock a pretty good lick.
Q. How long did they remain there in front of the dock before going around to the slip?
A. Several minutes; perhaps half an hour.
Q. Did they attach any lines to the dock?
A. I believe they got out one line on the outset; I am pretty sure they did.
Q. You did not see it yourself?
A. No, sir.
Q. Did you see Mr. Boyce at any time after the collision and prior to the overturning of the barge afterwards?
A. Yes, sir.
Q. What was he doing?
A. The last time I saw him he was down in the hold of the barge taking wheat away from the siphon.
286 Q. Were you down in the hold?
A. I was down in the hold, yes, sir.
Q. How long prior to the overturning of the barge?
A. A very few minutes.
Q. By whose orders was Mr. Boyce there?
A. I could not say as to who ordered him.
Q. What, if anything, do you know about the listing of the barge on the voyage from Portland to Astoria?
A. Nothing.
Q. You don't know anything about it?
A. No, sir, I was off duty.
Q. Do you know anything about shifting the wheat from side to side on the way to Astoria?
A. No, sir.

Cross-examination.

Questions by Mr. COTTON:

Q. How long were you on duty between Portland and Astoria?
A. From sunup to sundown. We left Portland a little after one o'clock; I came on about sundown.
Q. You went on about sundown?
A. Yes, sir.
Q. And you remained on from that time?
A. Yes, sir.
Q. Until the collision?
A. Yes, sir.
Q. Until you struck the dock?
A. Yes, sir.
Q. You don't remember anything peculiar about the way in which the barge handled herself, do you?
A. She was a little hard to handle, I remember that.
Q. Most barges are hard to handle, are they not?

287 A. I could not say because I have not run on towboats, but very little; that was my first experience; I could not say much about it.

Q. In making a landing does a boat have more or less tendency to strike against a dock at all times and on all occasions?

Q. When you say it was a fairly good lick, you mean to say it was nothing more than ordinary; that it struck it a pretty good lick, but about the way it generally does?

A. It struck pretty hard where I was standing; it may have struck harder than I thought. The barge was loaded pretty heavy and my being on the boat it would take quite a rap.

Q. For you to feel it back there?

A. Yes, sir.

—. Did you hear the engineer or Mr. Lounsberry say anything to Captain Short about coming on deck?

A. Not until about the time the barge started over.

Q. How many times before this had Captain Short been on deck?

A. Once or twice. I could not say how many times.

Q. He had gone up several times, had he not?

A. He came up once and told me that he dropped the lantern in the water and it went out and to bring him another light down in the hold and I went down in the hold with the light.

Q. How deep was the water right behind this dock?

A. I could not say; I did not sound it.

Q. Do you know how long the barge was on the bottom?

288 A. No, sir; I could not say.

Q. How close an examination did you make of the barge after the accident?

A. I did not make a very close examination.

Q. Where were you?

A. We were laying right astern of the barge.

Q. You just looked at it from there?

A. Yes, in walking along the dock.

Q. You say you saw certain timbers broken off here down below?

A. Yes, indications that the timbers were rotten.

Q. You say you saw those; were they not below water?

A. No, sir; they were about the edge of the water.

Q. Do you mean the water was only that deep there?

A. Yes, sir, at times; it was at times over; the tide affected it.

Q. Then the water was not very deep around behind there?

A. No, sir, I should think not.

Q. That is at low-water tide?

A. No, sir.

Redirect examination.

Questions by Mr. WOOD:

Q Do you know by whose orders Peterson went from the "Ocklahama" on to the barge to go to work?

A. No, sir.
Q. Where was it you last saw him at work?
A. The last time was in the hold.
Q. With Captain Short?
A. Yes, sir, with Captain Short.

289 Recross-examination.

Questions by Mr. COTTON:

Q. Do you remember of the engineer going down in there while they were together?
A. No, sir.

Excused.

GEORGE CARTER, a witness called on behalf of respondents, being duly sworn testified as follows:

Direct examination.

Questions by Mr. WOOD:

—. Mr. Carter, what is your business?
A. My business is upon the river here upon those barges and steamboats and everything else.
Q. For how long a time?
A. For pretty near this last thirty years.
Q. Have you ever been on the barge "Columbia"?
A. Yes.
Q. For how long a time?
A. I have been off and on her for about five or six years.
Q. When was the last time you served on her?
A. When Mr. Dodge was in the company.
Q. Do you remember how long ago that was?
A. Somewhere about seven or eight years ago, was it not?
Mr. WOOD: I don't know.
Q. What was the carrying capacity of the barge as allowed by the company at that time?
A. About that time it was about 450 tons.

290 Mr. COTTON: I object to the answer of the witness as immaterial and irrelevant in any aspect of this case and move to strike it out. I insist that if there was any negligence in the overloading of the barge that Balfour, Guthrie & Co. were parties to it, assented to it and put their own wheat on board of it and were present actually observing the effect which the loading of the wheat had upon it.
Testimony received subject to the objection.

Q. How long did you serve on her?
A. I could not tell you. I was working on her, the "Autocrat" and "Columbia Chief," the three of them at one time until they got other men to put on to them; we first loaded one and got her unloaded and there would be another.

Q. For how long a time were you running the three?

A. I guess I was running them for a couple of years.

Q. From your experience with the "Columbia" as a bargemaster, what do you think would be a proper and fit load, as the highest load?

A. About 400 tons; it was always a crank barge and when you put 600 tons on her you had as much as you could do to keep her on her bottom; we had to put ballast in her when she was first built, to keep her on her bottom with 600 tons.

Q. When did you last see the "Columbia"?

A. I saw her after she was broke up at the dock.

Q. When did you see her last before that?

A. I have seen her down at the bone yard. I am a watchman.

Q. You are familiar with her, are you?

A. Quite familiar.

291 Q. At the time you last served on her, when you left her, what was the "Columbia's" condition as to being tight and staunch and strong, and whether her timbers were sound or not?

A. No; she was shaky, there were rotten timbers in her then, for I tried it myself; once I had a couple of butts taken out.

Q. Now, when you saw her down in Astoria what was her condition then as disclosed as to her timbers being sound or rotten?

A. They looked to me to be pretty well rotten, and all her fastenings were eat away; the spikes in it were eaten away with the salt.

Q. What is the character of the bottom of the river where the "Columbia" lay?

A. Soft mud.

Q. What is the character, if you know, of the beach of the river outside where the "Columbia" lay?

A. It is a little harder in shore; you get into a harder bottom in shore, but all the way out to the middle of the slip it is soft.

Q. How is the bottom where she sank and broke up as to being comparatively level or shelving, which is it?

A. It is pretty level, a little deeper water alongside of the dock than out of it; it is on account of boats lying there; it makes a kind of bed.

Q. In your capacity as bargemaster, have you ever been aground with your barges?

A. No.

Q. Do you know whether or not it is to be expected that a barge will take the ground occasionally?

292 A. If you happen to knock a hole in it you have got nothing to do but run her on the ground, and she ought to be strong enough to bear her load if she is aground, keep from sinking.

Q. Have you ever laid any of your barges on ground on purpose?

A. Yes; I have laid that barge on ground time and time again, and the "Columbia Chief."

(COURT:)

Q. What barge is this you speak of?
A. Both the "Columbia" and "Columbia Chief," inside of that dock.
Q. How long ago was that?
A. Ten years ago, I guess.

(COURT:)

Q. She was built so she would lay on the ground all right?
A. Certainly, only the water got into her and the list and she fell to pieces; that is the amount of it.

Questions by Mr. LORD:

Q. How did it happen that she fell to pieces?
A. Because she was not strong enough to bear up; her frame gave out, I suppose was rotten.
Q. From your examination down there it appeared to be rotten, didn't it?
A. I did not know anything about it; I did not examine the hull.
Q. After the accident did you examine it?
A. No, I looked along her flood ends.
Q. A perfectly sound barge would have stood the strain, would it?

Mr. COTTON: I object. A barge strong enough to stand the strain would have stood the strain.
Objection sustained.

293 Q. If a barge was heavily loaded and was listing from side to side occasionally, not every moment, but listing once in a while and then tipping back again, or if it was listed and stayed listed upon that side, affect the steering or the management of it by the tug?
A. Say the barge was eighteen inches by the stern, say she was loaded eighteen inches by the stern, that is what made her steer bad; she ought to have been loaded six inches to the head so that the water could have been pumped out.
Q. Then she was not loaded properly and ballasted?
A. No, she was loaded too much by the stern to steer well.
Q. If she had been properly loaded and properly balanced, would she have ridden better in the water and more even?
A. She would have steered better and handled better and any water that came forward would have come to the pump; the pump was inside of the bulkhead and all the water runs forward into it when it is loaded up. I generally load them about six inches by the head and none by the stern at all; then they will tow easier and steer easier.
Q. Do you consider that a load of 588 tons was an extraordinarily heavy load for the barge "Columbia"?
A. It was too much for her.

Cross-examination.

Questions by Mr. COTTON:

Q. I understand you to say, then, that you think the "Columbia" was entirely overloaded?

294 A. I do; it was too much for her; that is, as much as we used to put to her with ballast in her hold, 600 tons. If you put that much on to her, it was very hard to keep her on her bottom when she had no ballast; she would likely list from one side to the other.

Q. When you put ballast in her you could put 600 tons on her?

A. Yes; she had fifty cords of wood in her and I had to take it out when we began to put less freight in her.

Q. That is when you were handling her?

A. When she had ballast in her I have put 600 tons on her.

Q. She took it down very easily, didn't she?

A. Yes, that is, when she was a new barge.

Q. And she had fifty cords of wood in her hold besides?

A. Yes, sir.

Q. What effect would a little water have in her hold?

A. It is very bad because it goes from side to side, it is movable; whichever way the water goes she would list.

Q. It would increase her listing somewhat?

A. Yes, the more water she got into her the more she would list.

Q. What was almost the inevitable effect of her standing around with 580 tons on her with a list?

A. That helped to turn her over, with the water in her hold.

Q. That is, when she was around behind the dock?

295 A. If they had given the boat the list against the dock she might have held up against the piles, instead of listing on shore and might have sunk alongside the piles, but instead of that they gave her the list towards shore; that is the way it happened; that is the way I look at it.

Q. Probably the same thing would have occurred if she turned around, wouldn't it?

A. No, if she had been strong enough she might have stood up.

Q. She might have dumped the whole load?

A. If she had been exceedingly strong she might have dumped it over in the water; it was the water in the hold, the water getting over on the side.

Q. Do you know anything about her cargo being shifted?

A. I have been upon cargoes that were shifted.

Q. You don't know whether they shifted her cargo or not?

A. No, I do not.

Q. Suppose it had been stated to you, with your experience, that she had been originally listed toward the dock and wheat put on until she had listed the other way, what would you say?

A. I would say that they were damn fools; that is just what I would say.

Q. And that was very likely the cause of the accident?

A. The loss of the wheat. If they shifted the grain across from

the inshore down to the offshore, that was what done it most likely.

Q. What kind of a dock is that at Astoria?

A. It is a very good dock, a very strong dock.

296 Redirect examination.

Questions by Mr. LORD:

Q. Is it not a fact that when a barge is heavily loaded it is customary to ballast the hold in order to keep equilibrium?

A. Some barges it is; every barge rises; there is a good deal of dead rise; they are built more like steamboats than barges. You can take ballast and put a thousand tons into them and it will not make any difference because they have got a wide floor on the bottom. I suppose the "Columbia" had all of two and a half feet of dead rise, if you know what that is.

Mr. LORD: No, just explain what that is.

A. The bilge where these floors go along is placed two feet higher than it is at her keel; that is what we call dead rise.

Q. Is that customary in the construction of tugs?

A. That gives a vessel a little more speed; they tow faster than a big wide vessel.

Q. But it is not as safe for carrying heavy loads?

A. Not quite as safe for carrying a load but safe enough for a ship.

Q. Now, if a barge of that build had loaded with all of the load upon the deck, would not that have a tendency to make it top-heavy, so to speak?

A. Would it not do what?

Q. If the load was all upon the deck, and if it was loaded as that barge was loaded, with 588 tons of freight upon it, wouldn't it have a tendency to make the barge top-heavy?

A. Certainly; it kept her going from one side to the other;

297 I guess it was as much as they could have done to keep it on the bottom. I think it was from one side to the other with them all of the time, and I think they were shifting wheat all the time to keep her on the bottom.

Questions by Mr. WOOD:

Q. Do you say that if the wheat had not been shifted, but she had been allowed to go down with a list toward the dock, that when the water left her and she felt the bottom that she would have stood up under that load?

A. Yes, I think she would.

Q. You think she would not have broken up?

A. Yes, I think she would have stopped.

Q. You don't think she would have broken?

A. I think not.

Q. When you spoke of a sound and staunch barge listing to one side and said she would dump the cargo, what did you mean by that?

A. She would dump it first before breaking.
Q. Dump it first without breaking?
A. Yes. I have known a barge to dump every pound of cargo, a barge-load of railroad iron, first on one side and then on the other and not sink.
Q. What kind of a load?
A. Ten or twelve feet anyway.
Q. How would the load affect the hull?
A. It buried it up to the hurricane deck. The wheat would have come over again.
Q. The wheat would have gone into the water?
A. Certainly, it all would have gone into the water.

Excused.

298 J. W. BABLIDGE, a witness on behalf of respondents, being duly sworn, testified as follows:

Direct examination.

Questions by Mr. WOOD:

Q. Captain, what is your business?
A. Steamboating.
Q. How long have you been a steamboatman?
A. I have been steamboating since 1867.
Q. Where?
A. On the Columbia river.
Q. Did you ever work for the Union Pacific Railway Company?
A. I never worked for the Union Pacific Company, I have worked for the Oregon Steam Company and the Oregon Railway & Navigation Company.
Q. Are you acquainted with the barge "Columbia" that was broken up at Astoria?
A. Yes, sir.
Q. When did you first know her as a barge?
A. I think she was built in about 1875.
Q. Have you known her more or less since on the river?
A. Yes, up to the time that I left the company's employ.
Q. Did you ever have occasion to tow her?
A. Yes, sir, I have towed her.
Q. When?
A. The last time I towed her was 1887.
Q. What load was she accustomed to carry then?
A. 450 tons at that time; if they wanted 25 tons more to finish the ship they put it on, but their orders were for 450 tons.

299 Q. In navigating the Columbia river with these barges and steamboats is it customary or is it a thing to be expected that the barge and a boat may have to take the bottom or will accidentally run aground?
A. They should not do it unless there was a fog on the Columbia river.
Q. But this is one of the accidents that may happen, is it not?

A. Yes, something might happen that you would have to beach her.

Q. Have you seen this boat since the accident?

A. Yes, sir.

Q. What was her condition as to soundness of timbers when you saw her?

A. I saw her on Sunday morning after the accident the first time; I did not go on board; I did not go to look to see whether she was sound or not; as I walked along the wharf I saw this new plank that has been put on the stern; the starboard of the boat was sticking out of the water and the frame that was right in the water; it looked to me as if it was rotten, although I was not so very close to it; I suppose ten or twelve feet; if it was not rotten it was all split to pieces; it looked as if it was rotten and all came apart.

Q. Did you notice anything about the stem?

A. No, I did not notice anything about the stem.

Q. How is the adjoining beach opposite to her?

A. It is flat if you get away from the wharf; they have a beach there which has been filling in there gradually for years.

Q. Do you know how long Captain Short has been running on the lower river here?

300 A. I don't know.

Q. Are you engaged on the river?

A. Yes, sir.

Q. Do you know all of the rivermen that are running on the river.

A. Pretty much all of them. There have been some new men that came from the Willamette river that I was not acquainted with.

Q. Do you know where Captain Short came from?

A. I think he was a Willamette river man.

Q. If the "Columbia" had on board of her say about 580 tons of wheat, in the condition in which she was; that is as you saw her, as to soundness and strength of construction as she settled on the bottom in that place where she was laying, would she in your opinion have held up under such a load?

A. I hardly know; I think it kind of doubtful if a vessel as old as she was could have done it.

Q. Do you think it would have made any difference as to her holding together under this strain whether or not she was listed toward the dock?

Objected to as incompetent. Objection overruled.

A. I think it would have been a good deal heavier strain on her than if she had been setting on her bottom.

Q. The point that I make is whether or not she had a list toward the dock that would have prevented her breaking up in any way.

A. If she had been right against the wharf I think it would have spread her some the way she was listed. The whole pressure was sideways on the boat, right against her bilge.

301 Q. Have you seen the remains, the relics of the barge since the accident?

A. I have seen some of it.

Q. Where did you see them?

A. Down at Smith's point the other day.

Q. What was the condition of the timbers as you saw them; just describe them and how much of the boat was left?

A. The bottom of the boat is left and part of one side of the boat; the part that I saw sticking out at the time of the accident was gone and the bows of the boat.

Q. Was the bow gone?

A. Yes, the bow was gone.

Q. The stem, of course, was gone?

A. Yes, sir, the stem was gone.

Q. What remains of the boat; where were the timbers broken?

A. The timbers were broken at the knuckle or bilge; some of them were, and the fastenings of some had come out. There were quite a number of the timbers broken and some where the fastenings had come out and pulled apart.

Q. Were there any evidences of unsoundness?

A. The boards looked pretty good as far as I could see but I would not say that the timbers there would be considered very rotton; the ends of some of the planks where they came up on the stern, the transom, looked bad, but the iron-work and the like of that that was exposed was pretty badly rusted up.

Q. This fragment that you saw when the barge was afloat, how would that be as to being under water or above water?

302 A. That part that I saw would have been above water; but the tide was pretty well over some of it; the starboard side was sticking out a little.

Q. But this fragment that you saw at Smith's point when the barge was afloat?

A. With any load on her that would have been afloat when the barge was afloat.

Q. How would that be in comparison with the timbers that were between wind and water, or the timbers that were exposed to the air?

A. Just as liable to rot there as any part of the boat; you look for rotten wood to the end of any boat more particularly than you would to any other part of it.

Q. But those parts were gone, I understand you to say, when you saw the boat?

A. Yes, the transom was gone and the bow, the bottom of the boat and a part of one side was there.

Q. As I understand you, the fragment that you saw at Smith's point when the barge was afloat, would have been all under water?

A. When the barge had a load on her, yes.

Q. How would those timbers have a tendency to rot as compared with timbers that were exposed to wind and weather, and which would keep sound the longest?

A. That would rot there as quick as anywhere.

Q. Where?

A. At the ends, as I spoke of, because they were out of the water lots of the time; the boat was not heavy as much as light.

303 Q. Do I understand you to say you did not see the transom at Smith's point?

A. Where that plank from the bottom comes up and fastens on to the transom at the ends of the plank.

Q. You saw that at Smith's point, did you?

A. Yes, I saw that; I did not see the square part of the stern where the barge comes up and fastens on to the stern end; it was built like a stern wheel.

Q. How were those timbers at the time you saw them?

A. There was no timber there; the next timber forward was there; the timbers that should have been there were not there and that piece was the piece that I saw when the barge lay there at the wharf at the time she broke up.

Q. And at the time you saw that piece lying at the wharf what did you think of its condition?

A. I thought it was rotten.

Cross-examination.

Questions by Mr. COTTON:

Q. How long did you say you examined the wreck?

A. Day before yesterday.

Q. Did you see the piece that was lying about by the trestle there that was afloat?

A. I saw the deck lying up there.

Q. Did you see the whole side?

A. No; I did not see the whole side lying outside of the trestle; I saw part of the bottom and part of the side.

Q. Inside of the trestle and right near the beach?

A. Yes.

304 Q. What is that piece that lays in there, the back part of the stern, that is sawed of- and lies there?

A. The back part?

Q. Yes; the stern? Is not there a piece entirely sawed off that is lying there?

A. I did not notice the back part of the stern.

Q. You did not notice a piece sawed right off square, right down there in the neighborhood?

A. The bottom of the boat there where the planks came out from under the bottom up to the stern I saw, and I saw part of one side.

Q. But you don't remember seeing the greater part of the stern and the transom lying there; you did not examine that part, did you?

A. I did not see the transom there; the transom was not there that I could see anywhere.

Q. Did you notice any rotten timber the other day?

A. There was a little decayed; it is hard to tell unless you go to

where the timbers are and the plank; they might be rotten underneath.

Q. If I remember correctly, you saw the breaks in the frames there, didn't you?

A. Yes, sir.

Q. And the condition of the wood there at that point. Did you examine that?

A. Yes, sir; some of it there where the frames were broken off the timber looked good, but where the frames had pulled apart there did not seem to be any fastenings there; there was lots of it where the frames had broken off, and a great deal more where the frames were pulled apart, where they were supposed to have been bolted or spiked together.

305 Q. About how many frames did you notice down there that were broken off, do you remember?

A. I did not count them.

Q. They were all in a bunch, were they not?

A. Yes; quite a bunch all together.

Q. And those were broken off and were pretty good and solid, were right above the bilge strake, were they not?

A. They looked pretty good where they were broken off, yes, sir.

Q. This examination that you made was just a few days ago?

A. Yes, sir.

Q. And the accident occurred about a year ago?

A. Yes, sir.

Q. The wreck had been lying in the water, had it not?

A. It has been lying in the dock.

Q. In brackish water ever since, has it not?

A. Yes, sir; fresh water in the summer time.

Q. Did that have a tendency to rust the nails?

A. It might have a tendency to rot the nails.

Q. How large were these timbers and the frames that you say were broken off?

A. I suppose they must have been five inches thick and eight inches deep probably, some of them, and then they tapered.

Q. That is, they tapered up to the top?

A. Yes, sir.

Q. But right where they were broken was about the widest part of the timber, was it not?

A. Yes, sir.

Q. That is right below the bilge strake?

A. Right below where the bilge strake comes.

306 Redirect examination:

Q. Who invited you to look at the wreck a few days ago?

A. Mr. Lounsberry.

Mr. COTTON: If that has anything to do with the case I want to cross-examine on it.

Q. As I understand you, you said that you saw the wreck Sunday morning?

A. That was Sunday morning after it was wrecked.
Q. What day of the week was it wrecked?
A. I think it must have been Friday night.
Q. And you saw it the following Sunday?
A. The following Sunday morning, yes, sir.
Q. I don't know whether I understand you correctly, but what did you say about your examination at that time about seeing fastenings pulled away and iron worn and rusty?
A. I said in that part that was sticking up there where the new work had pulled away from the old work it looked rotten.
Q. And how about the iron?
A. I don't know about the iron at that time, but I suppose it was ten or twelve feet from it, on the wharf where I looked at it, but it looked like the timber where the transom was put on and the plank that was put on her side was rotten.
Q. Did you notice any of the iron fastenings at that time?
A. I don't know that I noticed any particularly; I saw that the new work had all gone away from the old work, and that timber looked as if there was nothing there to hold it.

307 Q. Now, the iron that you noticed a few days ago when you made the examination, I wish you would state how badly worn and rusty it was.

A. They were quite good-sized spikes at one time, but they are getting pretty small now.
Q. Was it a corrosion and rust that could have resulted in the latter part of that time?
A. I think not; they are spikes that have been in there ever since it was built, and they naturally rust out.

Questions by Mr. LORD:

Q. Is it customary to load barges similar to the "Columbia" with the load all upon the deck?
A. Those kind of barges have been loaded that way here altogether.
Q. Is that the proper way to load them?
A. That is the way they have been loaded, the "Columbia" and the "Autocrat," when they were built they were built so they could put machinery in them and use them for a steamboat if they wanted to, and they were built sharper and narrower than any of the rest of the barges for that river, and the "Columbia" especially had to have ballast in her when she was new to carry her load.
Q. Is it customary to put in ballast in the bottom of the barge in loading?
A. If she was built for a barge properly, for barge business, no; not unless they are going to use it outside for river work I never knew them to put any ballast in.

308 Q. From your experience with barges of the build and style of the "Columbia" would you consider 588 tons a load or more than a load?

A. More than a load I would consider for her now at this time of her life.

Q. You consider that she was overloaded if she had that much?

A. I do; I was working for the company last month; I was towing those barges.

Q. For this same company?

A. Yes, sir.

Q. Have you ever loaded the barge "Columbia"?

A. I did not load the barges; I towed them. I was captain of the boat that did the towing.

Q. Did you ever have any orders in regard to the amount that should be put upon the barge "Columbia"?

A. The captain of the barge has got those orders, but I know what the orders are.

Q. Would the fact that the barge was upon a list while going from Portland to Astoria, listing from one side to the other, affect the management in towing it?

A. It would in a measure. No boat will tow as good on its side as on its bottom.

Q. It would affect its steering, would it?

A. It would affect its steering and it would not tow as well either.

Q. In approaching a dock with a pretty heavily loaded barge—take, for instance, the "Columbia"—would extraordinary caution or care be required?

A. I think there would; yes, sir.

309 Recross-examination:

Q. You say you visited this at the request of Mr. Lounsberry?

A. Yes, sir; he asked me if I would go down and look at it.

Q. Did he say why he wanted you to go down?

A. No, he asked me to go down and look at it.

Q. You have testified twice before in this matter, haven't you?

A. Yes, sir.

Q. You testified at the coroner's inquest?

A. Yes, sir; I testified as to what I saw there at the barge that Sunday morning.

Q. And then again you testified for Mr. Flanders?

A. Yes, sir; down at Astoria.

Q. And the other day and each time you said that you had made practically no examination of her except what you made from the dock?

A. I said that I had made no examination except what I saw from the dock. I didn't expect to be called as a witness either at the coroner's jury or any other place.

Q. Then Mr. Lounsberry asked you to go down and look at her?

A. Yes, Mr. Lounsberry asked me to go down and look at her.

Q. Didn't he tell you he wanted you to go down so that you would get a pretty good view of her now?

A. No, he told me that the barge was down there and he wanted me to come down and look at her.

310 Q. Did he say that he wanted you to testify?

A. He did not say that he did or did not, or anything about it.

Q. You testified once before for Mr. Flanders, didn't you?
A. Yes, sir. I will tell you what I do think; I think if they had run the barge and put her right up on those flats right alongside of that railway track, they might have saved the cargo; it was practically a flat bottom; they could have saved a part of it. I think, with my present experience, I could have saved the barge in a good many ways.
Q. You say you never took 600 tons?
A. I was towing her when they allowed her to carry 600 tons; she used to carry over 600 tons.
Q. She used to carry 600 tons when she had ballast in her?
A. I don't know that she did; I don't think she did. When she was new she was a crank, and they had to put ballast in her to make her stand up with 600 tons.
Q. And afterwards she got older and water soaked?
A. Afterwards she got older and water soaked; then they took that chance; of course when the bottom gets water soaked and old it is as good as ballast, when it comes to that, as long as it is sound.
Q. Do you know how many of those timbers broke off altogether?
A. No, I don't.
Q. About fifteen or sixteen right along in a row, were there not?
A. There might have been.

Excused.

311 T. F. NEAL, a witness called on behalf of respondents, being duly sworn, testified as follows:

Direct examination.

Questions by Mr. WOOD:

Q. What is your business?
A. Master and pilot.
Q. Where do you live?
A. Astoria.
Q. How long have you been engaged as a master and pilot?
A. About ten years.
Q. Where?
A. On the Columbia river and at sea.
Q. Have you navigated the river between Astoria and Portland?
A. Yes, sir.
Q. Do you know the rivermen engaged in navigating the boats of the lower river?
A. I have known them until lately; we have a great many strangers here now.
Q. How long had Captain Short been on the lower river, as far as you know?
A. I did not know Captain Short; I would not have known him if I had seen him.
Q. What business are you engaged in now?
A. Piloting.

Q. Have you ever worked for the Oregon Steam Navigation or the Oregon Railway & Navigation Company?

A. No, sir.

Q. Have you ever been engaged in towing on the river?

A. Not with stern-wheel boats.

Q. Are you familiar with the channels and river bottoms at Astoria?

A. Yes, sir.

Q. Did you see the barge "Columbia" after the collapse?

312 A. I saw the barge "Columbia" on Sunday morning, I think.

Q. How long was that after the wreck?

A. I don't know at what time she was wrecked; I was not in Astoria.

Q. Do you know whether it was the next Sunday after she was wrecked?

A. The Sunday following the collapse.

Q. Where did you see her?

A. Lying on the inside of the Union Pacific wharf.

Q. State what the appearance of her timbers was as to soundness or rottenness, as far as you saw.

A. I was not on board of the boat and made no examination; so I could not certainly say whether she was rotten or not.

Q. What was your impression from what you actually saw from the distance you did see?

A. From the appearance of the wreck I should judge that she was pretty weak; the whole top work had slid open.

Q. What was the character of the bottom of the river there?

A. It is uneven; there is a channel running along the dock; it is uneven.

Q. From what you saw of the barge "Columbia," and assuming her to be a keel-built barge, with a dead rise of two feet, do you think that with 580 tons on her, with the water going out and leaving her on the bottom there, that she could have stood up under such a load?

313 Counsel for respondents objects as incompetent and because the witness is incompetent to express an opinion.

Objection overruled.

A. I think that she would have stood up on a level bottom, on a level soft bottom.

Q. Do you mean where she would have kept on an even keel?

A. Where she would keep on an even keel or a level bottom.

Q. Suppose she did not, the water went out so as to careen her over. She has this dead rise, you understand?

The COURT: You do not have to inquire about that, you know exactly what did happen.

A. She might throw her load.

Cross-examination.

Questions by Mr. COTTON:

Q. Captain, you have had considerable experience in this matter of ship-loading and barge-loading, have you not?

A. I have had considerable experience in deep ships; I have not had so much experience with barges; I have seen barges loaded.

Q. Suppose you had a vessel of this kind and she was standing on a more or less soft bottom, and even keel, do you think it would be proper to shift her cargo so as to list her over to one side?

A. It would depend upon circumstances; if she was full of water I would want her to make to the dock and not touch the cargo.

Q. But listing very gradually?

314 A. I think I would have listed her, if anything, a little toward the dock.

Q. You would get her on an even keel or list her toward the dock?

A. I would have tried to do so.

Q. When you list her over there you subject the timbers of the boat to a strain, in an unusual degree, do you not?

A. With a heavy load, certainly.

Q. And in a direction in which they are not supposed to support such weight?

A. Yes, sir.

Redirect examination:

Q. In navigating the "Columbia" is it necessary in cases to take to the ground purposely?

A. In cases of accident it would be the first thing that a master of a pilot would do.

Q. Have you ever done it?

A. I have never had occasion to do it. I have seen it done.

Excused.

A. H. RIPLEY, recalled on behalf of respondents.

Direct examination.

Questions by Mr. WOOD:

—. Mr. Ripley, have you procured the original notes that I asked for this morning?

A. Only a few.

Q. Can you give me the loads carried by the barge "Columbia"?

Mr. COTTON: I object unless the witness produces them
315 all; we have got a right to have all the loads he has ever loaded on her.

Objection sustained.

Q. Did you bring everything that you had on that subject?

A. No, I brought what was convenient for me to bring here; I

can't very well take the books out of my office without asking my employer who was not there.

Q. How do you keep those memorandums?

A. I keep them in a large shipping book.

Q. Where do you first enter them?

A. I first enter them in the pass books like this (indicating).

Q. In pass books?

A. Yes, sir.

Q. Then do you transfer them?

A. Yes, sir, to my shipping books.

Q. Then what do you do with the pass books?

A. We don't care what becomes of them.

Q. Have you got the shipping books showing the entire record, the complete record?

A. Yes.

Mr. COTTON: I would like for counsel to state what he expects to prove by this testimony.

Mr. WOOD: I propose to prove that none of the company's barges, the "Columbia," "Columbia Chief" or "Autocrat" have been carrying any such load as the one put upon this barge.

The COURT: I don't think this testimony is admissible. You can prove, if you want to, that this barge was overloaded.

Excused.

316 ROBERT ANDERSON, a witness called on behalf of respondents, being duly sworn, testified as follows:

Direct examination.

Questions by Mr. WOOD:

Q. What is your occupation?

A. Shipmaster.

Q. How long have you been engaged in the business?

A. I have been three years with Balfour, Guthrie & Co.; three years down there at the office.

Q. And how long before that have you been engaged in the shipping business?

A. Twenty-three years.

Q. In what capacity?

A. All capacities; I worked twelve years as master.

Q. State whether or not you know the barge "Columbia" belonging to the Oregon Railway & Navigation Co.?

A. Yes, sir.

Q. When did you last see her?

A. When she sank there at Astoria.

Q. State how you came to be there at that time.

A. I was the agent of Balfour, Guthrie & Co., to look after the shipment of the wheat, and before leaving the place I went on board the barge and counted the wheat over and inspected the wheat and saw in what position it was placed in the barge. I spoke to the

master of the barge about it; he had a list to starboard about three inches.

The COURT: It was a very simple question asked you, simply answer the question.

Q. How did you happen to be down to Astoria at that time?

317 A. I went down there to see to the shipment of the wheat made on board the "Westgate."

Q. What was the "Westgate"?

A. She was a British ship.

Q. Where was the wheat destined to be carried?

A. I could not say.

Q. State when you arrived in Astoria?

A. I arrived in Astoria two days before the barge got down there, I think.

Q. And before that had you seen the barge here in Portland?

A. Yes, sir; I had.

Q. Where was she at that time?

A. At the Montgomery dock.

Q. Was she loaded when you saw her?

A. Yes, sir.

Q. Did you have a conversation with the master in relation to her load?

Petitioners' counsel objects as incompetent.

(No ruling.)

A. Yes, sir; I did.

The COURT: What do you propose to prove by this testimony?

Mr. WOOD: I expect to prove that he spoke to the master of the barge and asked whether or not the barge was not overloaded, and he said yes, he thought she was, but he had his orders from Capt. Pegram to put the load on.

The COURT: Is the master of the barge here?

Mr. COTTON: Yes, he is in the room.

Objection sustained.

Mr. Wood excepts.

Q. Did you see the barge after the accident?

318 A. Yes, sir.

Q. How long after the accident?

A. I was there about a quarter to six in the morning; that was the same morning that she sank.

Q. Did you see any cutting of the timber going on?

A. Yes, sir; I was down there when they started to cut away the timber.

Q. For what purpose?

A. To get to the bodies that were down below, the men that were imprisoned down below.

Q. State what the condition was of the timbers that you saw, as to soundness.

A. I should think they were very far gone, all that I saw about the barge.

Q. Where were the timbers that you saw?

A. All that I could see around the barge, the timbers were broken and in a very bad condition, I think.

Q. Did you notice how the irons were?

A. Yes, sir; I noticed that all the fastenings were rusted away.

Q. What would you say as to the general condition of the barge then as to being staunch and strong and seaworthy?

A. She was very far from being so.

Q. You have been at sea, I believe?

A. Yes, sir; all my life.

Q. In your opinion could that barge have grounded and held up a load such as was put upon her, 580 tons of wheat?

Counsel for petitioners objects as incompetent.

Q. Do you know anything about shipping?

319 A. As far as I have been connected with it, I know; yes.

Q. What has been your connection with it?

A. In my various capacities, always to look out as to the structure of them, and that sort of thing.

Objection overruled.

Q. In your opinion, was that barge in a fit condition to carry the cargo of 580 tons of wheat and take the ground with it?

A. No, sir.

Q. Do you think that when she began to settle on the ground she would have held up?

The COURT: Do not put the question in a leading form.

Q. What, in your opinion, would have been the conduct of the barge when she began to feel the ground and take the strain of the load?

A. From the condition of the timbers, I should think she was liable to burst up.

Q. Did Balfour, Guthrie & Co. ever have anything to do with the loading of the barge as to the way she was loaded or the amount she was to take?

A. No, sir; they had nothing to do with the loading; the people connected with the barge had all that to do.

Q. Did Balfour, Guthrie & Co. have anything to say about how much load she should carry?

A. They loaded according to instructions from Captain Pegram.

The COURT:

Q. Who did?

A. Balfour, Guthrie & Co.; they were putting the stuff in the barge; we only put it in in accordance with the instructions from him.

320 The COURT: Balfour, Guthrie & Co. loaded the barge themselves?

A. They put it down the chute; that is their part of the performance.

Q. What are the exact facts about the way Balfour, Guthrie & Co. furnished the wheat to the barge and what they had to do with the loading?

A. They took it to the top of the chute and put it down; the company supplied the men on board the barge and stowed it.

Q. Did Balfour, Guthrie & Co. have anything to do with determining how much the barge could carry?

A. No, sir.

Counsel for petitioners objects to the question as incompetent and moves to strike out the answer.

Decision reserved.

Cross-examination.

Questions by Mr. COTTON:

Q. What has been your occupation?

A. Seafaring all my life, and shipmaster.

Q. At this particular time what did you have to do with this cargo?

A. My duty at this time was to go down to Astoria and see the stuff that was shipped and the condition it was shipped in; prior to this there had been some trouble about short shipments, the sacks were short and I was sent down there to see the stuff aboard the ship.

Q. You had charge of the shipment of that cargo for Balfour, Guthrie & Co., didn't you?

A. No, sir.

321 Q. You were in their employ at this time, were you not?

A. Yes, sir, I was working for them.

Q. And looking after this cargo and seeing that it got down there?

A. Yes, sir.

Q. And that all of it got safely on board?

A. Yes, sir.

Q. Who told you to do this?

A. I was instructed by Mr. Scott.

Q. Did not the captain of the barge tell you, before this barge left Portland, that she was greatly overloaded?

A. We had a conversation and he was of the opinion that she was overloaded.

Q. He said so, didn't he?

A. Yes, sir.

Q. He told you that she was overloaded?

A. He said he thought she had too much in her.

Q. Where was this?

A. This was at the dock.

Q. At Portland?

A. Yes, sir.

Q. The same dock where the wheat was put on?

A. The same dock where the wheat was put on.
Q. How do you put this wheat on the boat?
A. It is put down a chute from the dock into the barge.
Q. Who put the wheat on the chute?

The COURT: He has testified to that.

A. The stevedores do that.
Q. They are in the employ of Balfour, Guthrie & Co.?
A. No. I guess they are paid by the ship company.
Q. They are under the control and direction of the stevedores? Mr. Scott superintends those men?
A. Yes, sir.
322 Q. That is his business?
A. Yes, sir.
Q. The same Mr. Scott that testified the other day?
A. Yes, sir.

Redirect examination:

Q. From the examination that you made of the barge after the wreck, do you think she could have received the injury that she did at the collision and being in the condition which she then was, and could have taken the ground with any cargo at all and stood up under it?

Counsel for respondent objects as not proper redirect examination.
Objection overruled.

Q. Suppose she had had even 400 tons on her, state whether she would have stood up and held her load?
A. It is doubtful, but I think the barge was twisted.

The COURT: Is this testimony for the purpose of showing that the overloading had nothing to do with the accident?
Mr. WOOD: Yes, sir, possibly.

Recross-examination:

Q. Do you know what the shock was to the barge at the time of the collision?
A. Yes, sir; they were making the landings there.
Q. Were you on board?
A. No, sir.
Q. Do you know how great the shock was?
A. No, sir.
Q. Then you are testifying about what somebody told you?
323 A. No, sir; I am testifying from my experience what I think it would be.
Q. Do you know that it ever hit the wharf?
A. I was down to the wharf the next morning and I saw where it had struck across one of those piles.
Q. Do you know that barge had struck there? You don't know that, do you?

A. No, I can't swear that?
Q. You don't know anything about that?
A. No, sir.
Q. You don't know whether it hit it light or heavy, do you?
A. No, sir.
Q. Then your opinion in regard to it being twisted is based entirely upon what a whole lot of people told you, is it not?
A. No.
Q. How do you know she hit?
A. I know she struck outside; I heard that she struck.
Q. That is, from what people told you, is it not?
A. Yes, sir.
Q. That is your theory?
A. Yes, sir.

Excused.

Thereupon an adjournment was taken until tomorrow morning, August 26th, 1893, at 10 o'clock a. m.

WILLIAM BOYCE, one of the respondents herein, being duly sworn in his own behalf, testified as follows:

Redirect examination.

Questions by Mr. WOOD:

Q. What is your business, Mr. Boyce?
A. My business used to be going to sea.
Q. Have you ever worked on the Columbia and Willamette rivers?
A. I have, yes, sir.
324 Q. In what capacity did you work last?
A. Deck hand on the "Ocklahama."
Q. Were you present at the trip that the "Ocklahama" made when this collision occurred with the barge "Columbia" at the dock in Astoria?
A. Yes, sir.
Q. Where were you at the time the collision occurred at the dock?
A. I was just getting out of the hold.
Q. The hold of what?
A. Of the barge.
Q. At the time the collision occurred, coming into the dock?
A. No, not at that time; I was on the bow.
Q. The bow of what?
A. The bow of the barge.
Q. State what kind of a night it was.
A. It did not look to be a very dark night; it was not a very bright night either; but as far as that goes that would not have anything to do with making the landing at all, on account of the darkness.
Q. Why not.
A. I could see the shore where I was on the barge.

Q. Was there any light on the dock?

A. No, there was no light on the dock.

Q. What was the condition of the tide?

A. I did not know what the condition of the tide was at that time; I just happened to get out of the barge when she was coming in.

Q. How did the barge strike the dock?

A. It was almost a straight shoot from the dock, more of a glance down the stream than anything else, at the time it glanced down the stream.

325 Q. You were approaching from upstream, were you?

A. Yes, sir, from upstream.

Q. That is you would come directly in on your route from Portland?

A. From Tongue point there is a regular shoot-over.

Q. Which was the nearest to the dock on the inside, the "Ocklahama" or the barge?

A. The barge.

Q. What side of the barge was the "Ocklahama" tied to?

A. The barge was last.

Q. As you came into the dock do I understand you to say that the "Ocklahama" would be nearest to the dock?

A. No, sir, the barge would be nearest to the dock.

Q. Yes, that is what you said. Do I understand you to say that the barge would be nearest the dock?

A. Yes, sir.

Q. Probably you don't understand me then because under those conditions that would be impossible. If you were coming down the stream and the barge was on the starboard side, which side of the "Ocklahama" was the dock on?

A. Which side of the "Ocklahama"?

Q. Yes.

A. It was on the right side or on the left side.

Q. On the port side?

A. Yes, sir, on the port side.

Q. So that the "Ocklahama" would, as it were, be *be* between the barge and the dock?

A. If she had landed downstream, yes, sir.

Q. How was the barge fastened or lashed to the "Ocklahama"?

326 A. She was fastened pretty well astern, she had five or six lines out.

Q. Which was ahead, the barge or the "Ocklahama"?

A. The barge was ahead.

Q. How much of a blow was given at the dock?

A. She was going at about the rate of five miles an hour, four or five miles an hour, I should judge.

Q. Do you know whether there was any damage done to the dock itself by this collision?

A. It appeared to shift some of the piles from one side to the other.

Q. What was done after this collision?

A. We backed out again; I believe there was a line put out; I don't know who put the line out though, because at the time she struck I ran for the boat; when she struck it listed; at the same time I made a run for the boat, and she listed towards the boat and then I ran back to the bow of the barge again; I thought she was going over and I would be on the under side, so she came up again and the captain came down and asked me what was the matter. I says, "She is struck, that is all."

Q. What was done then?

A. The captain went up then, backed out a little ways—no, at that time the captain went down on the anchor; the anchor was hanging down.

Q. The anchor of what?

A. The anchor of the barge, and the two flukes were in the water and the captain was going down. He got on the stop and just as he got there the chain slipped; we had to turn the bits at the same time, so I was holding the lantern over the bow to the cap-
327 tain and the captain made the remark, "By God," he says, "that was a narrow escape." I says, "Yes." So he says, "You had better go aboard of the boat and get the tarpaulin," so he and Peterson went aboard the boat and got the tarpaulin and spread it over the bow of the barge and we backed out and went on the inside.

Q. Then what did you do when you got on the inside?

A. We passed the dock and measured on both the sides of the barge to see if there was any bottom, if she would strike, and we found that there was about seven feet of water, soft ground, soft bottom.

Q. And then did you tie the barge to the dock or not?

A. Yes, we made the barge fast to the dock.

Q. Then what did you proceed to do?

A. We proceeded to build a bulkhead.

Q. Who was at work at that?

A. I was, and Bill Mann was along with me at the time.

Q. Who was Bill Mann?

A. He was another deck hand.

Q. On where?

A. On the boat.

Q. The "Ocklahama"?

A. Yes.

Q. Who else was at work at the bulkhead?

A. That is all. Peterson, I believe, was down there and he ran up right away, and then Bill Mann came down and he helped, and then the man that was on the dock he came down.

Q. Mr. Lounsberry?

A. Yes, and he was in a sweat, didn't know whether to stay
328 or come out; he was standing there shivering and I was looking at him, and I passed the remark to the captain and I said, "He looks kind of scared of this business," and the captain says, "There is nothing the matter with this; I have seen a boat

up the Willamette river just like this and fixed her," and I asked him what boat, and he said the "Occident."

Q. Was Captain Short down in the hold at this time?

A. Yes, we were working together.

Q. At this time state who were there, all of you?

A. I, Bill Mann and Captain Short at that time.

Q. Where was the "Columbia" damaged by the collision?

A. On the bow. While I was standing on the bow of the barge the mate and the watchman were standing there talking together.

Mr. COTTON: Don't repeat so much conversation. Tell what you saw.

A. (continued). Yes, that is what I am telling. Me and the watchman were standing there together and the watchman said, "She is coming in terribly fast."

Mr. COTTON: I object to that.

The COURT: State the conversation.

Mr. COTTON: State what you know.

Mr. WOOD: State the facts, not what you've heard.

(Cross-)

Q. You heard that?

A. He ran for the guard and he says: "Cap., you had better back her; she is coming in too fast."

Mr. COTTON: I move to strike that out.

Motion granted.

Q. Where was the bow struck?

A. In the stem.

Q. Was the stem injured?

329 A. Yes, it was injured, and it was a very black, dirty looking stem, too.

Q. How much of an injury or break was it?

A. It was cracked all to pieces.

Q. Did you see the water coming in?

A. Yes, sir; I saw the water coming in.

Q. How much of a leak was that?

A. A pretty good leak.

Q. Can you describe the way the water came in, about how much there was of it?

A. No, I could not describe just how much there was of it, but there was two or three good streams coming in, and we were trying to calk them up with the sacks; we were emptying the wheat out into the bulkhead and trying to jam the sacks into where the leak was.

Q. Did the water spurt into the "Columbia" at all?

A. A little bit, not very much.

Q. How far?

A. About the length of your arm.

Q. State what was done to pump her out, or attempt to pump her out.

A. They had a little bit of a pump there; it did not look as though it would pump a rowboat out.

Q. Where was this situated?

A. In the forward hatch, that is the one forward inside; I don't know how many hatches there were inside, but this was the forward one inside; I believe that was the only hatch they could find. I was looking around with the lantern at the time to see if I could find one and there was no hatch there, I could not see any; so the watchman passed the remark, there was no hatch; Ferguson said so.

330 Q. Go on and state what was done toward pumping her out.

A. They got a hose; went uptown and got a hose, and were away a good while, and when they came back and put the hose on they thought it was all right, turned on the steam and she bursted.

Q. What bursted?

A. The hose bursted off the pipe where it was attached, I believe.

Q. Who was rigging this hose?

A. I believe two engineers, Mr. Smith and another; I don't know what the other man's name was, McCarty I think, and the fireman, Pat. Barry.

Q. After it bursted, what did they do?

A. Put it on again, tried it again.

Q. With what success?

A. After they got it on it would not work again; there was too much wheat down at the bottom of it, and it was around the bottom of the siphon; it could not draw.

Q. What did they do?

A. They sent people down there to clear this away and I was one of them sent down, and when I got down there word came to jump out there, she was going over, and I heard a crack at the same time.

Q. What did you do at that time?

A. I jumped up and Pat. Barry was holding the wheat up to prevent it coming on top of me, and we jumped out and I got out as quick as I could and got hurt.

Q. How did you get hurt?

331 A. The wheat fell down and that threw me, and I got all the weight on my arm, and the barge was capsized in such a way that I could not get on my feet, and I started to slide overboard and I held on as tight as I could with my hands.

Q. When the barge started to go, describe as near as you can how she went, as to whether it was slowly or quickly or not?

A. She went quickly; she went pretty lively.

Q. After you were hurt what did you do then?

A. There was a plank leading from the barge to the dock; I got up and walked on that, walked to shore on that, and shortly after I got up Mr. Barry came out of the house at the same time crawling along, and he managed to get out, too.

Q. After the hose bursted how long a time was it before you got it rigged again and made another attempt?

A. I should judge about half an hour.

Q. How long before this time that you went down to fix the siphon had any of the shifting of the wheat by the crew of the barge "Columbia" been stopped?

A. About ten minutes.

Q. When you came up out of the hold of the barge do you know where Captain Short and Peterson were at that time?

A. They were coming running towards me; Peterson had the lantern; he was up in the eyes of the barge, and Marshal Short ran as hard as he could and dropped his saw and hatchet, and I said, "Come on; come on; hurry up," and I just got up in time; Short was right after me; I could see him.

Q. Where was this siphon end in, where you were working?

A. At the hatch.

332 Q. How far from this siphon end were Peterson and Short at this time?

A. About thirty or forty feet.

Q. After the accident happened did you see anything more of the barge?

A. Yes; I was looking at the barge and looking to see if I could see Short or Peterson coming out. Afterwards, and when I heard the men singing out, it made me feel as though I had escaped pretty narrowly.

Q. Did you see them afterwards at all?

A. I never saw them afterwards. I made the attempt to go and cut the deck afterwards, and I found out my arm wouldn't work, and it commenced to swell up in such a way that I could not work it.

Q. What was the condition of the timbers of the stem that was broken, as to soundness, when you saw it?

A. Very bad; very bad inside, and all the pieces which came from the bow were very old pieces. We passed the remark there, "It wouldn't take very much to knock it to pieces."

Q. When you say they were very old pieces, what do you mean by that; were they sound or not?

A. It did not look as though it would stand very much thumping.

Q. What was the color of this wood that came from the inside, as compared with the natural color of sound wood?

A. It did not look like sound wood; it was black and slimy and in an awful state.

333 Questions by Mr. LORD:

Q. Who went down with you in the hold at the second time of going there; give the names of the persons?

A. I went down myself and when I went down I found Ferguson there, and he was coming up at the time to put the hatch on, and Pat. Barry was there. Pat. Barry says, "Don't you put the hatch on there."

Q. No matter what he said. Were there any other parties that came into the hold to assist you in the work that you were doing?

A. No other parties.

Q. What other persons were there in the hold at the time?

A. Captain Short and August Peterson, they were forward.
Q. Why did you go into the hold?
A. I was ordered there.
Q. By whom?
A. By Captain Baker or the mate Tackaberry.
Q. He was the second in command of the tug, was he?
A. He was the second one in command at the time. He had to obey his orders, and I had to obey mine from him.
Q. Was Mr. Peterson ordered there at the same time you was?
A. I believe when I went up Captain Short called Peterson down at that time, but I can't say.

Mr. COTTON: You don't know anything about it.

Q. Did you hear it?
A. No, but I was expecting myself to be called, and I did not want to go.

334 Q. Why didn't you want to go?
A. I was afraid of it.

Q. About how long in your opinion did the careening of the barge "Columbia" take place after the collision with the dock?
A. How long did it take for the careening?
Q. From the time that the barge turned over to the time of striking the dock around on the other side, about how long was it?
A. I should judge about a couple of hours; working all of the time, I could not tell what time it was; I could not see the clock.
Q. Now will you describe particularly the manner in which your arm became injured while escaping from the hold?
A. I broke it, and then it swelled up terribly afterwards.
Q. How did you break it?
A. My whole weight came down on the arm; I could not tell what broke it; I commenced to slide overboard at the time, and I held on as tight as I could with my bare hand.
Q. That was in your endeavor to escape the danger from the careening of the barge, and you were trying to get away?
A. Yes, and the wheat fell and that threw me out.
Q. Did you make any examination at all of the timbers of the barge?
A. Yes, sir.
Q. Any particular examination?
A. No, but I went out and I had to look at the barge afterwards in the daylight, and I could see where the transom was

335 squashed right out and the bow was bursted open and everything was just as black looking as it looked inside where I was.

Q. Is it not a fact that wood of vessels remaining a long time in the water becomes dark and black?
A. No.

Mr. Cotton objects on the ground that the witness has not shown any special knowledge on that subject.
Question withdrawn.

Q. Where did you go after the morning of the 22d?
A. We came in here.
Q. Where did you go then?
A. To the hospital.
Q. What hospital was it?
A. St. Vincent's.
Q. How long did you remain there?
A. About two months; sixty days or ninety days, something like that.
Q. What were you treated for?
A. I was there to get fixed up again but I did not get it.
Q. When were you discharged from the hospital?
A. About two months after I went in, December some time.
Q. Do you know the reason of your discharge?
A. Yes, the doctor said he could not afford to keep me any longer; too much expense on the government.
Q. During that time did your arm get well?
A. No, it is not well yet.
Q. Since the 21st day of October last have you been able to perform any work whatever?
A. No, sir.

Q. Have you performed any work whatever?
336 A. No, sir, I have not.
Q. Are you in a condition today to perform any work with that arm?
A. I could if I got some job that I would not have to use the hand.
Q. What has been your business?
A. Hard work every day of my life.
Q. What nature of business?
A. Sailorising, steamboating and everything in that line.
Q. For how many years?
A. I first started to work at 11 years old.
Q. How old are you now?
A. 26.
Q. You have been at that about 15 years?
A. Yes, sir.
Q. Has your arm been examined by physicians since the accident?
A. Yes, sir, about three times since. I wanted to go back to the hospital once after I got up and the doctor told me——
Mr. COTTON: Never mind what the doctor told you.
Q. What is the main trouble with your arm today?
A. It is broken.
Q. Is there no strength there, or what?
A. There is no strength there.
Q. Your lifting power has gone then, has it?
A. I can lift a little bit yet; it is partly gone; I can lift a little bit; very little though.
Q. In your business as longshoreman and sailor and deck hand, is the use of that arm necessary in the performance of your duty?

A. It was the best arm I had, my right arm.

337 Q. It was your right arm?

A. Yes, sir.

Q. How much wages were you receiving on the "Ocklahama"?

A. $40 a month.

Q. Were you paying your own board out of that?

A. Yes, sir—no, I did not pay my own board out of that, but I had to when I was out of a job; that is, $5.00 a week.

Q. Then you were paid $20 a month and your board?

A. I was paid $40 a month and board.

Q. They paid you $40 a month and board?

A. Yes, sir.

Cross-examination.

Questions by Mr. COTTON:

Q. Mr. Boyce, you say you examined the barge. What time after the collapse?

A. No, I did not say that; I said I had a look at her afterwards; I did not examine her.

Q. When was that?

A. The same evening.

Q. Did you examine her in the daylight?

A. The same evening, yes; it was daylight.

Q. You were hurt that morning?

A. Yes, sir.

Q. What time?

A. About three o'clock; half past two or three o'clock.

Q. Daylight?

A. No, it was dark then.

Q. I thought you said you examined her some time in the daylight?

A. So I did.

Q. When?

A. In the evening.

Q. The evening of the day before the collision?

A. No, after.

338 Q. After?

A. Yes.

Q. Where had you been during that day?

A. I was in bed.

Q. And then you examined her when?

A. When I got up to get my supper, then I went out and had a look at the barge afterwards to see what kind of a thing I got tripped up on.

Q. Did you go on board of her?

A. No, sir; I could not get aboard of her; she was too far away from the dock.

Q. Where did you go?

A. The stern of her was right up against the strake that got filled

up there coming into the Union Pacific dock and I could not help seeing anything there.

Q. Where had you been in bed?

A. In my bunk, on the boat.

Q. On the "Ocklahama"?

A. Yes, sir.

Q. You say you walked out on the connection with the barge and the land, is that where you went?

A. I went off the boat.

Q. Whereabouts?

A. On the dock.

Q. What part of the dock?

A. The upper end of the dock; that is, the upstream end.

Q. Didn't you go out any other place?

A. No, I did not go out any other place.

Q. I thought you said you went out in the street?

A. I got off of the bow of the boat and went through the dock on the street.

Q. Where did you go from there?

A. Went right back to the boat again.

339 Q. Then your examination was made by walking out on the connection between the dock in Astoria and walking along the side of the dock and to the boat again, is that it?

A. That was part of my examination.

Q. What other examination did you make?

A. At this particular time?

Q. Yes.

A. I did not make any particular examination of her at that time.

Q. What do you mean by the barge striking the dock and moving some piles when you were coming into Astoria? What do you mean by that?

A. She struck kind of between the piles like.

Q. She did not break any, did she?

A. She splintered them at the head; that was all that I saw.

Q. Did she do that?

A. I did not go up close enough to look at them.

Q. Do you know whether she did that?

A. I know she did that.

Q. Do you know that she splintered some piles that way?

A. I know that, but I don't know how much she splintered them.

Q. That is as true as any other piece of testimony you have given?

A. Yes.

Q. Are you sure she struck the piles at all?

A. Yes; I was right there when she did that.

Q. Where was she broken?

A. Her stem was broken.

Q. What part of the stem?

A. The whole business; very near up to the deck.

340 Q. Wasn't it broken right down near the water line?
A. Part of it.
Q. Was not that where she struck?
A. She might have struck there, but it did not look as though she would strike on that fender pile around there.
Q. Don't you know she did strike there?
A. Don't I know that she did strike there?
Q. Yes; at the dock.
A. Yes; but I don't know whether that hurt her any or not.
Q. What?
A. I don't know that that hurt her or not, because she had her bow out of the water; then she was pretty well settled down astern.
Q. Whereabouts on this pile did she strike?
A. I did not look at that close to see; I did not measure it either.
Q. Did she run the stem right into the piles?
A. It went between the piles and scattered them.
Q. And you don't know whether it hit any one of the piles or not, do you?
A. I was not looking just at that time to see whether she struck the piles right fair or not; I was trying to get out of the way as fast as I could.
Q. Now, where was the barge taken after this?
A. After this?
Q. Yes.
A. She was standing there for a few minutes, and the captain went down and had a look at her to see how she was hurt and then he gave orders to fetch the tarpaulin and take her on the
341 inside; Ferguson was saying he wanted her inside, the captain of the barge.
Q. He wanted her taken back and put inside, did he?
A. Yes.
Q. The captain took her around?
A. The captain took her around.
Q. Where did he put her?
A. On the inside of the dock. There was supposed to be very soft mud there, so she would settle there and she would stay up.
Q. Do you know anything about the condition of the bottom of that place?
A. Yes, sir; I measured it with the pole, and the pole would sink down in it.
Q. It was soft bottom was it?
A. It was very soft where I measured it.
Q. About how deep was the water?
A. About seven feet.
Q. Now after Ferguson had the barge brought around behind the dock, what did you do then?
A. I went in and gave them a hand to shift the wheat; that was the first thing I did; that was the orders, and then we shifted the wheat, and she made a lurch then, and I ran up and opened the doors to see what was the matter; then we had orders to shift the

wheat again and we went back and shifted again, and when we shifted about twelve or fifteen sacks that would throw her over to one side and the guard would go over into the water, well that was in the water at the starting out.

Q. The last time you shifted the cargo, which way was it, away from the dock or towards the dock?

342 A. Away from the dock.

Q. Away from the dock?

A. Yes, sir.

Q. Who went up after this hose?

A. I don't know, I was down in the hold at that time.

Q. How long before the collapse did Mr. Lounsberry come down?

A. In about an hour or half an hour, or something like that; but when he came down he was in a hurry to get out; I could see that. I passed the remark——

Q. (Interrupting.) A short time before the collapse?

A. You could call it that if you are a mind to, a half hour or something like that.

Mr. WOOD: You asked the witness how long after the collapse.

Mr. WOOD: I meant before the collapse.

Q. How long before the collapse? You mean an hour before the collapse? About an hour was it before the collapse?

A. He was not down there before the collapse. You mean before we struck the barge?

Q. No, before the barge broke up, collapsed.

A. He must have been down there about an hour before that.

Q. You say he was in a hurry to get up?

A. Yes, I could see that.

Q. You don't mean to say he was afraid, do you?

A. I don't know whether he was afraid or not, but he looked pretty shaky.

Q. What did he say?

343 A. He kind of stuttered in what he was talking about; he said it would cost too much to get men up there; they would try to get men up to work her at present.

Q. Did he say anything about being afraid?

A. No, I did not say that he said anything like that. I said he looked shaky; I could see that.

Q. You could see that, could you?

A. Yes, sir.

Q. You noticed that?

A. Yes, sir.

Q. You are sure about that?

A. Yes, sir, I am pretty sure of that; we passed that remark; me and the captain.

Q. What did you say about him?

A. We said: That fellow must be scared; he looks that way. I did not know his name at the time.

Q. You knew what he was, didn't you?

A. Yes, I knew he was some kind of an agent at the dock.
Q. How long had you been working on this boat before?
A. I worked about a month and a half on the "Ocklahama."
Q. You used to see him every time you went to Astoria, didn't you?
A. I don't know whether I did or not. That was the first time I ever noticed him.
Q. You knew he had charge of matters down there, didn't you?
A. I did not know what kind of a man he was.
Q. You knew that it was Mr. Lounsberry, didn't you?
A. I heard the name, but I could not keep it in my head.
344 Q. What did you do after Mr. Lounsberry left you in the hold; where did you go to then?
A. I staid in the hold.
Q. How long did you stay there?
A. I staid there until the captain got up and came up, and he put on his jumper or something and was ready to go down, and I went out, and I knew at that time he was going to call me down, and I did not want to go down.
Q. Why?
A. I thought somebody else could take their turn; it was not my place to be there all the time.
Q. Is that the only reason?
A. I guess that is as good a reason as I could find to try and get out of it.
Q. You went down and had your lunch, didn't you?
A. I went upstairs and had my lunch.
Q. You came back after lunch, and what did you do?
A. Then I went aboard of the barge again; we shifted the wheat again, commenced shifting wheat, and then we came out again, and they were talking about wheat and such stuff being under the siphon's tips.
Q. Had any wheat fallen down there?
A. I guess there was wheat there all of the time.
Q. Had some wheat fallen through the hatch?
A. Yes, some had fallen down?
Q. Why had it fallen down?
A. The barge had such a list all of the time, and the
345 people working around the hold, got this wheat, and wheat would naturally fall.
Q. You went down into the hold of the barge then?
A. When I was ordered, yes.
Q. Why did you go down?
A. Because I was ordered to.
Q. Didn't you want to go down?
A. No, I did not.
Q. Why not?
A. I kind of thought the thing was going to capsize sooner or later, and that was what I was afraid of.
Q. What made you think that, or are you sure you thought it at all?

A. I ought to know my own thoughts.

Q. Did you have any basis for thinking that?

A. Yes, sir.

Q. What was it?

A. She looked so ticklish that I could not help thinking so.

Q. What was there about her that looked ticklish, or was there anything?

A. Overloaded, water in the hold and everything wrong.

Q. Listed?

A. Yes, sir; her guard was in the water, and when a ship guard gets in the water it is time to begin to get out of there, to get scared.

Q. Any tendency to bulge out on her sides? Didn't you say something about that a little while ago?

A. Did I say so?

Q. Yes.

A. No, sir.

Q. Did she bulge out?

346 A. She did after she got started, everything bulged out.

Q. Now this wheat you say had fallen off of the piles and had dropped down the hatchway?

A. The wheat fell off the piles, yes, that is the wheat piles.

Q. You say that, did you?

A. Yes, I did, and they passed a remark to get away from the hold. Pat. Barry passed the remark it would knock the wheat down, it was shaky.

Q. You went down and fixed the siphon and when you were coming out you got hurt?

A. The wheat fell down and threw me on the barge when I was coming out of the gangway door.

Q. Threw you on the barge?

A. It threw me on the barge, yes.

Q. What part of the barge?

A. On the bow of the barge.

Q. What do you mean by the bow?

A. That is the outside of the house that is supposed to be the bow, the fore end of her.

Q. Where was this hatchway you were at?

A. It was about 15 to 20 or 30 feet; something like that; I did not measure the distance inside of the house.

Q. How far was the end of the house from what you call the bow?

A. I call from the end of the house right out to the stem, the bow.

Q. How far?

A. I should judge that was about 13 feet or something like that, or maybe 15 or 20 feet long.

347 Q. Where were you when the wheat first threw you?

A. I was running out.

Q. On top of the wheat?

A. On top of the wheat. That was the only way I could run.

Q. How far did you run?
A. As far as I could to the gangway door and that kind of made me fall, and that was as far as I could go.
Q. You got thrown on the barge and hurt your arm?
A. Yes, sir. I could not get then on my feet, because it was slanted that way.
Q. Did I understand you to say that you broke your arm?
A. That is what I said, yes.
Q. When did you go to the hospital?
A. About the 22d or 23d of October.
Q. Did not this accident happen the morning of the 22d?
A. Yes, on the morning of the 22d.
Q. When did you go to the hospital after that?
A. I went there when the boat got up.
Q. That is when the "Ocklahama" got up?
A. Yes, sir.
Q. Did you say how long the barge before the collapse had taken the bottom?
A. It must have been about two and a half hours. She took the bottom as soon as she went in there. The tide might have been ebbing all that time, and she took a little stronger, that is a little more weight, it would sink down a little more.
348 Q. When you were down in the hold with Mr. Lounsberry and Captain Short, was Mr. Peterson with you at that time?
A. No, sir.
Q. He was not with you at that time?
A. No, sir.

Redirect examination.

Questions by Mr. LORD:

Q. Was Mr. Peterson a deck hand on the "Ocklahama" with you?
A. Yes, sir.
Q. Working in the same capacity?
A. Yes, sir.

Questions by the COURT:

Q. Who was this that you made the remark to that Lounsberry looked as though he was scared?
A. I did not make the remark, but the captain made that remark to me, and I says, "Yes, he does look scared."
Q. I thought you just now stated that the captain was not down there?
A. No, Peterson was not there.
Q. I understood you to say the captain.
A. No, Peterson was not down there.

Questions by Mr. LORD (resuming):

Q. How much water was there in the hold when you went down?
A. I could not see much water in the hold when I went down.

Q. What part of the boat did you go down through in the hold?
A. The forward part.
Q. Was the boat upon a level keel or was she "canty," and if so, which way?
A. Down by the stern, heavy.
Q. Did you go back into the stern of the boat to ascertain how much water there was?
A. No, sir.
349 Q. Was the water when you went back running from the bow to the stern?
A. Yes, the water was running to stern from the bow.
Q. Very much?
A. A pretty fair stream.
Q. What was the reason that the boat did not set even on her keel there?
A. She had too much water on, I guess, and the water threw her to one side.
Q. Do you know anything about the condition of the ground there underneath the water, as to its being level?
A. There is a kind of a slope there; it slopes right off the end of the dock from this slip, No. 2 slip, I believe we were lying at.
Q. Do you know when they ran the barge and the tug around there, if they ran her as far as she could go in the mud or not?
A. No, I guess it was the same depth of water right along the dock.

Mr. COTTON: I suppose this is hardly proper redirect, and I would like to have an opportunity to cross-examine on these matters.
The COURT: You will have an opportunity.

Q. Did they run the barge and the tug as far into the slip as they could conveniently; that is, did they get into as shallow water as it was possible for them to do in that slip?
A. No, they could have pushed it a little further if they had tried?
Q. Did they run aground when they first went into the slip?
A. Yes, sir.
350 Q. She touched and it struck a bar, did it?
A. Yes, sir; they passed word along she is on bottom.
Q. During the time when the barge was careened over and you were injured, was the "Ocklahama" attached to the barge?
A. Yes, sir.

Recross-examination.

Questions by Mr. COTTON:

Q. Mr. Boyce, what do you mean by the slip?
A. You know there are slips all along the docks, what you call slips.
Q. The dock, as I understand it, has just got a plain front all the way along, so far as the piling is concerned, hasn't it?
A. Yes, sir.

Q. What you call a slip is simply a shoot alongside of the dock?
A. Yes.
Q. It is not a place where you put a boat in?
A. No.
Q. It is not like a ferry-boat slip in New York, where you put a boat in?
A. No, sir.
Q. It is just a plain side?
A. Yes, sir.
Q. They could stop her any place where they thought it was a proper and suitable place?
A. Yes.

Excused.

W. J. SCOTT recalled.

Questions by Mr. WOOD:

Q. Mr. Scott, had you notified the petitioner here, The Oregon Short Line, of what amount of wheat you wanted lightered down the river in this particular case?
A. Yes, the exact amount.
351 Q. Had you requested any particular towboat or any particular barge?
A. No.
Q. Did you have anything to do with that?
A. I had nothing whatever to do with that.

Cross-examination.

Questions by Mr. COTTON:

Q. Didn't you go up to Mr. Hendee's office at that time and tell him that you wanted a barge?
A. I may have done so, or notified him by telephone that the "Westgate" wanted so much lighterage.
Q. You went up on this occasion to Mr. Hendee's office and notified him that you wanted a barge?
A. I could not say whether I went or telephoned him.
Q. Don't you remember the circumstances that at that time they were just paying off the crew of this barge "Columbia" that had come in?
A. No.
Q. You don't remember that?
A. No, I saw nothing of that.
Q. Do you remember Mr. Hendee saying to you that you could have the "Columbia"?
A. No, I did not know what barge we were going to have, until the barge was alongside the dock.
Q. You had loaded the "Columbia" several times before, hadn't you?
A. Yes.

Q. Frequently?
A. Yes.
Q. You had sent down cargoes on her for how many years past?
A. Probably a little over five years; four years at that time.
352 Q. Loading her with wheat?
A. Yes.

(Direct:)

Q. What is your general custom in connection with that company? Do you notify them how much wheat is to be lightered and does that end your connection with it?

Objected to as immaterial. Objection sustained.
Excused.

B. R. PEGRAM recalled.

Questions by Mr. WOOD:

Q. Captain, how long had Captain Marshal Short been in charge of the "Ocklahama"?
A. I could not tell you here; I could tell you that down to the dock. Probably six weeks, longer.
Q. How much longer?
A. Not much longer; I should not think much longer than six weeks, if that long.
Q. How long had he been in the company's employ?
A. He was in the company's employ when I came here, two years ago.
Q. Where was he at work then?
A. On the upper Columbia.
Q. Had he been working in any other place than that when he was transferred to the lower Columbia?

Objected to as immaterial and irrelevant.
The COURT: If it is claimed he is a licensed pilot and that is not denied, I think that is sufficient.
Mr. COTTON: Do you claim that Captain Short was an officer of the barge?
353 Mr. WOOD: I say the barge and the tug were one and the same vessel.
Mr. COTTON: And that Captain Short was an officer of the barge?
Mr. WOOD: In this particular case.
Objection withdrawn.

A. I think he was.
Q. Do they do any towing in the upper river where Captain Short had been at work, of any description?
A. Very little; it is not a general thing like it is below.
Q. And do they tow any such loads and barges of such capacity as the "Columbia"?
A. No, sir.

Questions by Mr. WATSON:

Q. You say that Captain Short had been in the employ of the company about two years?
A. I think he has been with the company ever since I have been here, two years ago last spring.
Q. He had command of the boat all of the time, had he?
A. I could not tell that.
Q. How long?
A. I don't know; he had been away a good part of the time.
Q. Do you know how old he was?
A. No, he was a young man, I think.
Q. Do you know what wages he was receiving at the time he was killed?
A. $125 a month; as much as anybody.
Q. Do you know what kind of an officer he was?
354 A. I think he was a first-rate one. I did not put him there. He was a man that was energetic, always seemed to have good judgment and seemed to have good luck. I gave him the best boat I had.

(Cross:)

Q. Do you consider the "Ocklahama" the best towboat you have got on the river?
A. Yes, sir.

Excused.

It is admitted that Captain Marshal Short was a licensed pilot for the upper and lower Columbia and Willamette rivers.

J. C. FLANDERS, a witness called on behalf of respondents, being first sworn, testified as follows:

Direct examination.

Questions by Mr. WOOD:

Q. What is your business?
A. Attorney-at-law.
Q. In what office?
A. Office of Williams & Wood.
Q. Did you examine the barge "Columbia" after this accident?
A. I did.
Q. At what time?
A. I think it was about the 24th or 25th of October last.
Q. Where was she at that time?
A. She was at Astoria in the inside of the Union Pacific dock.
Q. I wish you would state now a detailed narrative of what you did and what you saw. Make it as brief as you can.
A. The circumstances of my seeing the barge?
Q. Yes.
355 A. I think on Monday after the accident Mr. Burns of Balfour, Guthrie & Co. sent over to me and said that he had

a claim against the Union Pacific for the loss of the wheat and that he and all of his office was busy, as it was in the wheat season, and he wished I would go down to Astoria and look at the barge and report to him. I went down that evening, which was either Monday or Tuesday evening, and examined the barge as thoroughly as I could then. The barge was lying, as I said, inside of the dock at Astoria, listed away from the dock, and her house, I think, had floated away or been taken off, and there was nothing but the upper deck of the barge with the wheat on it. The barge was, I might say, collapsed in the middle, but her bow and stern were considerably above water. I think at the time I was first there it was low tide. I went on the bow and I hired a boat to take me around in the stern; made as thorough an examination as I could and took pieces of the wood from different parts of the wreck.

Q. State what parts of her you specially examined?

A. I examined the stem, saw the stem, and there were several holes cut in the forward part of the deck and at the stern the side of the barge was pulled away and there was a hole there; I suppose over a foot. I looked in it as well as I could and from it took pieces.

Q. Did you examine the fracture at the stern?

A. I did.

Q. What was the conditions of the timbers around the stem and of the stem?

356 A. I would not consider them sound.

Q. What was the conditions of the timbers at the stern?

A. They were very bad.

Q. Was there any evidence of her having been repaired and new pieces put into old?

A. Yes, sir; she had a new deck and a new guard, and the only other evidences of repair I saw were that there were deck frames or deck beams, of course, which would run from one side to the other, and on these the planking was laid, and in several places I saw, I think, strips probably two by four inches and twelve or fifteen feet long extending across the middle, and this was fastened to the old timber.

Q. State whether or not there was any separation of the parts of the barge.

A. Yes, sir; as I said the side was pulled apart, bulged out, and in several places I could see where the new repairs have pulled apart from the old, the nails had pulled out and the old wood had crumbled and become soft.

Q. Did you examine her along the bilge streak?

A. No, sir; I could not see that; I did not go down underneath.

Q. You say you took pieces from various parts of her?

A. Yes, sir.

Q. (Handing witness pieces of wood.) Are these the pieces of wood that you took?

A. Yes, sir; those are the pieces. I think this was a part of one of the wheat sacks, and I took it off and put in a few pieces of the wood.

Q. I wish you would identify these special pieces as to the
357 different parts of the barge, from what part of the barge they came.

Mr. Cotton objects as incompetent.

The COURT: The evidence may go in subject to the objection.

A. These two pieces, which were originally one piece, I took from the stern. I put my hand inside, rowed around to where the break was, and put my hand in and pulled it out; it seemed to have been a part of one of the old frames and it was a piece to which the side was apparently fastened (indicating one of the pieces). This I think was one of the old deck frames, a piece of one of them forward, and these (indicating other pieces) were also pieces.

Q. This piece was from where?

A. That was probably forty or fifty feet from the stem.

(Cross:)

Q. Out of what, did you say?

A. One of the deck beams. These pieces are all from the deck beams as I remember.

Q. What part of the ship?

A. I took them along from just in front of the wheat; where the wheat was I could not get, but the wheat had rolled down towards the middle so that a part of the barge which was originally covered by the wheat was not—the wheat did not cover as much space on the barge as it did when it was loaded, because it had slided off from the side and rolled down to the middle.

Q. And this was in front of where the wheat had cleared?

358 A. Some of it was. I did not label it at the time, and I cannot state just what particular part each piece came from, but they are from different parts along there. I will state that I did not select these particular pieces because they were more rotten than others, but I took them as samples. I know more or less about rotten wood because I am interested in a dock of which I supervise the repairing, and I know a little about it.

Q. From your inspection of these timbers then, in what condition would you say generally that the barge was as to being sound or not?

Mr. COTTON: I object on the ground that the witness is incompetent to express an opinion.

Mr. WOOD: I mean of the timbers.

Question withdrawn.

Q. You may state, Mr. Flanders, taking the entire length of the barge, as far as you examined her, what you saw as to her actual condition as to soundness.

A. I looked at the stern as well as I could where this break was. Everything there looked to me to be black and old, and there was no evidence of any new repairs whatever, and the sides of the barge appeared to be more or less of a shell, that is, a shell of sound wood; on the inside of the wood appeared to have been dry rot

there, and the planking was not sound all the way through. Up forward where these holes had been cut, I looked down there; I could not get down there very well, but there was the same evidence of black wood there; decayed wood there; and I saw no repairs there other than the repairs to the deck and the guard.

359 Q. Now, what if any, of the parts that you examined were above or below the water line when the barge would be afloat, loaded?

A. I presume in the stern; that would have been below the water line; I should have considered it would.

Q. And the rest of it not?

A. Except those forward, of course her forward; that was below the water.

Cross-examination.

Questions by Mr. COTTON:

Q. I don't quite understand these pieces, Mr. Flanders?

A. (Indicating.) That black piece comes from the stern.

Q. That black piece that comes from the stern?

A. Yes, sir.

(COURT:)

Q. Those two pieces?

A. Yes, sir.

Q. And all the other pieces come from the deck beams?

A. Yes, sir, I think they do. One of those—some of those have crumbled; the more rotten portions have crumbled away, leaving the shell.

Q. Do you mean to say, Mr. Flanders, that that wood which you say comes from the deck beam is a sample of the deck beam?

A. I don't say they were all the same as that, because, as I say, there were some new pieces nailed on the old, but they had pulled out in a number of places.

Q. Was not the deck at the time you saw it practically intact, except where the break had occurred?

360 A. No, I don't say that it was; I know there were a number of places——

Q. (Interrupting) Hav-n't you just a few days ago seen almost the entire deck in the neighborhood of about a mile of where this accident occurred, alongside of the trestle?

A. No, sir, I have not seen it since that time.

Q. Don't these pictures show, as a matter of fact, that the deck was practically intact except where the break occurred?

A. I suppose the pictures show for themselves.

Q. But was not that a fact, Mr. Flanders?

A. Of course, there were only a few places on the deck where I could find this timber, because I could not see the rest of it.

Q. Why could you not see the rest of the deck beams?

A. Because the planking of the deck covered it up; I could not get underneath.

Q. And that was practically intact, was it not?

A. Yes, the top held together of course; I don't know what was underneath, how it was where the weight had come, the whole barge had collapsed where the wheat was; that was all under water.

Q. Was it all or was not the stern down in the middle?

A. Down in the middle part of the stern was above water.

Q. And at low water you could see the inclination of the deck leading down towards the water?

A. I could see that the deck slipped down to where the deck was.

361 Q. And there was a break in the deck as well as in the middle of the barge?

A. I don't know whether it was broken there or not; I could not tell; it was covered by wheat; the company were taking the wheat off and selling it.

Q. There were new pieces in her deck?

A. There was new planking, but I saw no beams extending across from one end to the other; there were sort of stripes there fastened to the old beams, apparently to fasten the deck on; I should say there had been from what I saw; I should not consider that a new deck had been put on, but only enough timber below the deck to hold the deck to.

Q. (Referring to one of the pieces of the wood introduced in evidence.) And this one piece of the beam you took from where, this piece of a frame?

A. All from the stern.

Q. You did not get that from where the break occurred, did you?

A. No, sir, that was from the other side.

Q. Whereabouts did this particular piece of frame come from?

A. I could not say, any more than I rowed to the stern on the dock side, and I looked at the timbers as well as I could from the boat, and I put my hand in and took out this particular piece.

Q. That was at the stern, on the side towards the dock?

A. On the side towards the dock, yes, sir.

Q. And the break occurred in the middle on the side away from the dock, didn't it?

A. The break occurred in the middle on the side away
362 from the dock, but of course I could not see the timber on that particular side, because it was covered up by the water.

Q. You did not examine the timbers along on that side, did you?

A. I could not.

Q. They were all under water?

A. All except forward.

Q. You did not see any where the break occurred?

A. It was all covered up. No, I don't suppose I did where the break occurred see these particular timbers; they were all covered.

Q. You went down there at the request of Balfour, Guthrie & Co.?

A. Yes, sir.

Q. For what purpose?

A. Mr. Burns wanted me to go down and see how the accident occurred, the people who saw it and so on.

Q. You went over the barge for the purpose of making an examination of her for the purpose of——

A. (Interrupting.) Not the only examination that was made.

Q. No, I don't mean that; but that was the main object?

A. My object was to investigate the cause of the accident.

Q. You testified in regard to the outside shell. What do you mean by that?

A. I mean this: Of course all the planking on the side of the barge I could not see, but the end at the stern, where the plank was nailed, the plank were not sound all the way through.

363 Q. That is just at the edge of the stern?

A. At the edge of the stern.

Q. How many planks?

A. I should say half a dozen or so; I could not say how many. They were soft on the inside.

Q. When was the last time you saw any part of this barge?

A. The last time I saw it was in October last. I don't think I have seen it since.

Q. You have not seen any part of it since?

A. I have not seen it to remember it.

Excused.

Mr. Lord reads in evidence the deposition of Dr. G. B. Young as to the condition of the respondent William Boyce at the time he was received and discharged from the Marine hospital.

DAVID WALKER, M. D., a witness called on behalf of respondent, being duly sworn, testified as follows:

Direct examination.

Questions by Mr. LORD:

Q. What is your business?

A. Physician and surgeon.

Q. Have you made any examination of the right forearm of Mr. William Boyce, this gentleman here, and if so state in what condition you found it?

A. I examined it about three days ago. I found that there had been a flexion of the olecranon process and fibrous or ligamentous union. I found that the arm could not be completely extended nor absolutely flexed; that is to the extreme that an ordinary arm can. There was a certain amount of crepitus in the joint,

364 cracking showing that there were adhesions, most likely in the joint itself or in the ligaments.

Q. You were present in the court-room and heard read the deposition of Dr. G. B. Young, did you?

A. I was present and heard it.

Q. You heard his statement of the condition of Mr. Boyce at the time he treated him?

A. Yes.

Q. How did Mr. Boyce's condition at that time compare with the condition that you found him in three days ago?

A. Almost the same; decidedly similar.

Q. Has there been any particular improvement upon the condition as stated by Dr. Young that you discovered at the time of the making of the examination?

A. That is an unusual question.

Q. Do you know what condition Mr. Boyce was in at the time Dr. Young examined him from hearing the deposition read?

A. I can imagine his condition as seen by Dr. Young when he made that statement.

Q. What I want to know is if in your opinion there has been any improvement of the fracture?

A. Again I would say that is too absolute a question for me to answer yes or no. The conditions seem to be similar, but as for absolutely stating that there is no more power in his arm to hold a weight, no greater amount of extension or flexion, it would not be fair to me to state that, I not having seen the case at that time.

Q. What effect has a fracture of this kind upon a person, regarding the strength or lifting power, or motive power, flexion or extension of the arm?

365 A. Neither flexion or extension are as complete as they ought to be. The power of resistance, that is holding a weight, is not as complete; the arm, first of all, could not lift the weight that it might have done in health, and if it did lift the weight it could not continue to hold it as long afterwards; in other words the power of endurance is not so great.

In answer to your previous question it may be that the man has more comfort now in the use of his arm; that is, that the pain and annoyance may not be as great as they were, and doubtless are not as great as it was when Dr. Young saw it, but I question if the utility of the arm being increased or benefitted by the lapse of time since whatever time Dr. Young made the statement.

Q. Have you ever had a case of the fracture of the olecranon?

A. I would swear to three, and I have seen four; I have had two under my own care.

Q. Will you please state the nature of the fracture and the result of its healing as to the strength and utility of the arm afterwards?

A. In other cases?

Q. In other cases.

A. I have never seen a case of bony or osseous union; all of the cases have been healed by ligamentous union.

(The COURT:)

Q. You say you have never had a union the same as this?

A. No, sir. All that I have seen have united in the same way; all that I have seen are ligamentous unions.

366 Mr. COTTON: I do not think the question of counsel is material.

Question withdrawn.

Q. Doctor, what is the usual result, from a medical standpoint, of a fracture of the olecranon similar to this case, in reference to the use of the arm?

Objected to as incompetent. Objection overruled.

A. I question if the usual result be other than a loss of a certain amount of utility, usefulness.

Mr. COTTON: I move to strike out the answer of the witness on the ground that it is incompetent.

Objection overruled.

Q. Describe, if you will, Doctor, what muscles are affected and in what way the utility of the arm is destroyed?

Objected to as incompetent and immaterial. Objection overruled.

A. The extensor muscle of the arm, the three-headed muscle, is inserted into the tip of this olecranon process; it then becomes a question of physics to tell a jury, but perhaps not the court, when the union is not bony; in other words when it does not return absolutely to about the same length as it is first, it alters the character of the absolute relation of the fulcrum, the lever and the weight.

Q. Have you the particular bone there with you?

A. Yes (producing bone).

Q. Describe that.

A. That is the bone which is supposed to be broken; in this case I should judge about the center of it; so much so now that
367 the two joints are separated so that my little finger can come in there. Those two pieces of bone, instead of being joined by a pin as they are here, are joined by ligament, the muscle coming behind here (indicating) and acting on that part of the humerus; this bone here (indicating) does that. (Indicating) Now, the want of usefulness arises partly from the fact of this here (indicating) being elongated, and the distance from that (indicating) to, we will say here (indicating), which is where the hand is, is lengthened about a quarter of an inch. Again, the impinging surface of the humerus, instead of coming against a solid thing, runs against it, like a charge, a concussion, and there is too much resiliency, too much India-rubber action, and too little bony hardness to oppose.

(COURT:)

Q. Then, Doctor, I understand that what you would call in plain language the leverage, is altered?

A. The leverage is altered. Also in that joint there are adhesions in the ligaments around the joint, and the joint does not work with that freedom and facility which a healthy joint does. There might also be a question—and it is very interesting; I am evolving this out of my own head; I have never seen it in a book—that the ligamentous union of this bone may keep the tip of the olecranon process out of the depression which it goes into so that it is

almost near the edge and liable to slip out, whereas if it was in its natural condition it would go into it, because there is a great amount like that, and if it were on top it would force it.

Mr. COTTON: I move to strike out the answer of the wit-
368 ness on the ground that it is incompetent and immaterial.

Objection overruled.

Q. State if in your examination of Mr. Boyce's arm you have found the conditions which you have practically described here to be true in his case.

A. I was speaking of Mr. Boyce's arm.

Q. My question was, from a medical standpoint first. Does the condition which you have stated practically exist in Mr. Boyce's arm?

A. Yes.

Cross-examination.

Questions by Mr. COTTON:

Q. What does Dr. Young state about Mr. Boyce's arm in his deposition?

A. Just about the same as I have stated.

Q. What is that, please?

A. Complete inability to flex and extend his arm or to carry weight by his arm.

Q. You are referring to the last time Dr. Young examined his arm and not the first time, are you not?

A. I heard the testimony read; I heard it all. I spoke of the last time.

Q. You were referring particularly to the last time?

A. The last time.

Q. There is no swelling at the present time?

A. There is a very slight amount; there is some; it is visible.

Q. Do you mean to say that there is a complete inability on the part of Mr. Boyce to use that arm?

A. I have not used that word.

369 Q. I thought you said there is complete inability to flex his arm?

A. No, no; I said that the ability to flex his arm and extend it was not absolute; it did not come up to that maximum point which perfect health will allow.

Q. I think you misspoke yourself.

A. I did not use that word; I did not say that.

Q. How much less motion has Mr. Boyce than the normal amount?

A. That is a question in algebra or mathematics which I cannot give you an absolute answer to. I say it is not as complete as a healthy arm could allow.

Q. How much does it lack?

A. I can only absolutely answer that by taking an ordinary man and putting a weight in his hand, and tell him to move it and find when he relaxes it.

Q. I thought you said Mr. Boyce could not move his arm with the same facility?

A. I said so, decidedly.

Q. How much less movement has Mr. Boyce got than a normal arm?

A. Do you wish me to do it for you in tenths or hundredths? Is that the sort of answer that you require?

Mr. COTTON: No.

Q. How did you discover that he had this less movement?

The COURT: The object of this inquiry, Doctor, is to ascertain the extent of Mr. Boyce's injury, how serious it is, what its effect is.

A. By ocular demonstration trying to force his arm to the limit both of extension and flexion.

370 Q. Did Mr. Boyce then tell you that he could not move it any further?

A. I could not make him do it. I am as strong as he is, anyway.

Q. How much did Mr. Boyce lack of being able to move his arm to the normal extent that the average man could?

A. I would have to draw a diagram of the curve which the tip of his fingers would make.

Q. How far would he miss his shoulder?

A. He bent his arm right back near his elbow, towards his shoulder; perhaps in extension and flexion he had lost a tenth of his power.

Q. How many inches did he lack of being able to touch his shoulder, for example? Can he touch his shoulder with his arm?

A. I think not.

Q. You are not sure whether he can or not?

A. I am not putting touching his shoulder as the extreme. I can do that sort of thing (indicating).

Q. How far can Mr. Boyce touch his shoulder with his arm?

A. You can make the man do it himself, and it would be a better answer than anything I could give you.

Q. At the time you examined him——

A. (Interrupting.) I will repeat that I think the man had lost about a tenth of his power, the flex.

Q. That is not the question.

A. That is the way that I am answering it.

Mr. COTTON: I don't know what a tenth of his flexion would be, Doctor.

371 Q. You bent Mr. Boyce's arm towards his shoulder?

A. Yes, sir.

Q. Could he touch his shoulder with his fingers?

A. I *not* not prepared to answer that question.

Q. Did he or did he not?

A. I am not prepared to answer that question. Don't imagine that I am trying to shilly-shally at all; I tell you I am not prepared to answer the question, because I don't remember whether he did or not; but I know that he could not flex his arm to the extent that I could mine, or that you could make me flex mine, that is it.

Q. I know that you have answered that it may be five inches; he may not be able to move his arm at all. You say he lost a tenth of his power?

A. Speaking of ten as absolute number he could do nine out of that ten.

Q. Doctor, if a man lose one-tenth of his power of flexion towards his shoulder, could he still touch his shoulder?

A. As a mere abstract expert question I am not prepared to answer that, for I don't remember what, I say.

Q. You don't remember then how far Mr. Boyce can move his arm back towards his shoulder?

A. I remember that he could not do it as well as a healthy arm could do it.

Q. That is true, and beyond that you don't remember how much less?

A. A man always forms a sort of conclusion about what he sees, whether he makes a note of it or not. I did not make a note
372 of it at the time, but my general recollection is that the amount of flexion and extension that Mr. Boyce lost would be about a tenth.

Q. Then you are testifying from conclusions which you formed at that time, and not facts which you remember.

A. And not facts which remain? How can I have a conclusion without a fact?

Q. Do you remember whether Mr Boyce could touch his shoulder or not?

Mr. LORD: He stated that he did not remember.

Q. And you don't remember now, at the time you testify, do you? You don't remember at all?

A. I remember perfectly well causing the man to flex his arm; whether his fingers were extended so as to touch his shoulder, or whether his hand was clenched. I don't know; his hand may have been clenched. I know I did not try to make him do that (indicating), because that is another joint, or whether his hand was this way (indicating), or whether his fingers were this way (indicating), I don't know.

Q. I understand this impairment of motion is simply an impairment of motion in the elbow-joint?

A. Distinctly and absolutely; I have not spoken of any other joint excepting that.

Q. What was the other way in which you made him put his arm?

A. Absolute extension.

Q. And that you say is imperfect?

A. That is impaired; it comes to about that (indicating).

Q. You remember how far that comes?

A. I remember the other, too; but I did not tell you about the fingers.

373 Q. How far did the arm miss going all the way back?

A. I tried to tell you; it was about a tenth, so far as my absolute judgment would go.

Q. Can you state your idea now of a tenth?

A. I say if you take a curve and divide it into ten, that would be about nine of them.

Q. You examined Mr. Boyce for the purpose of testifying in this case?

A. Yes, Mr. Lord sent him to me.

Q. How much of your conclusions are based upon what the witness told you?

A. Very little.

Q. Part of them are, are they not?

A. Very little. Of course, I have to ask questions; I am no faith curist or mind-reader.

Q. Did he tell you that there was a loss of motion?

A. The patient did tell me, yes.

Q. From your examination, Doctor, as a scientific fact, did you know that there was a loss of motion?

A. I could see it.

Excused.

RICHARD HENRY BARBER, a witness called on behalf of respondent, being duly sworn, testified as follows:

Direct examination.

Questions by Mr. LORD:

Q. Doctor, will you tell us, as plainly as you can what you found as the result of your examination of Mr. Boyce?

374 A. I found a separation of the end of the olecranon process from the body of the arm; that is to say a fracture of the olecranon process, and it was united by ligaments and not by osseous union.

Q. From a medical standpoint what is the result of a fracture of the olecranon process and its results upon the strength of the arm?

A. It would impair the power of extension, because it would alter the lever.

Q. In altering the power of extension, does it impair the strength as well as the distance of extension?

A. Certainly.

Q. From the examination you made of Mr. Boyce did you find that his power of extension and also the strength of his forearm had been impaired?

A. Certainly.

Q. In what way?

A. I tested the power of his extension and I found that his resistance was impaired; the extension was impaired.

Q. Would the fact of a fracture similar to Mr. Boyce's affect his lifting power?

A. Certainly.

Q. Would it affect his lifting power from the shoulder up?

A. I think it would mean an evolvement of the shoulder-joint; it depends on the way you put it. When you put your hand up you are lifting by the movement of the shoulder-joint.

Q. It would affect the movement of the forearm?
A. Yes.
Q. Have you ever in your experience had any cases wherein fracture of the olecranon had taken place?
A. Yes, sir, in hospital practice.
375 Q. How many years were you in hospital practice, and where?
A. In Edinboro, Scotland; in Dublin, in Ireland; I was in Paris—that was some years ago; in Newcastle and quite a number of other places in London.
Q. Is there any particular length of time when a fracture of this kind is considered as healed or well?
A. Will you explain what you mean by "well"?
Q. By being well, so that the arm is as good as it was formerly.
A. That means, of course, osseous union?
Q. Yes; osseous union.
A. Supposing that osseous union takes place, it would get well in a month or so, six weeks, but the majority of these cases do not heal by osseous union, unfortunately.
Q. Why not?
A. Because the triceps, the three-headed muscle, tends to draw the fragment away; that is why you get a ligamentous union.
Q. Then the arm in which a fracture of the olecranon has taken place never gets well without there is osseous union?
A. Yes; going against some authorities that say they do, I have never seen a case of osseous union of the olecranon.
Q. It is uncommon for osseous union to take place?
A. Yes; it is uncommon.
Q. And until osseous union takes place it is impaired?
A. Yes, sir.

COURT:

Q. Are there authorities that say the other way?
376 A. I think so. I think if you will examine the recent text-books on surgery, I cannot tell you just what books, you will find that there are cases, no doubt. There are certain cases in which they claim they have osseous union, but authorities differ; one man will tell you that he has had six cases that have all healed with osseous union, and another will tell you that he has had eight cases that have all healed with ligamentous unions.
Q. You are a physician and surgeon, are you?
A. Surgeon and physician.

Cross-examination.

Questions by Mr. COTTON:

Q. How long ago did you examine Mr. Boyce?
A. I believe it was Wednesday; today is Friday.
Q. For the purpose of testifying in this case?
A. Yes, sir.

Q. You have prescribed for him?

A. No, sir.

Q. His arm is as good now as arms generally are from fractures of this kind?

A. That is a question that is rather difficult to answer. Suppose I repeat the answer I gave before: If the joint heals by osseous union, it is; then if it does not, of course it is not as good as it would be.

Q. This is about as good a healing of the arm from ligamentous unions as they generally get, is it not?

A. Yes, sir.

Q. It is what you call the usual ordinary effects of the breaking of the bone of that arm?

A. Unfortunately it is an uncommon effect; I hope it is not a usual injury.

377 Q. But it is the way they generally heal according to your experience?

A. Yes, personally the few cases I have seen. It is not a common case. A few cases that I have known have unfortunately healed with a ligamentous union.

Excused.

Recess until 1.30 p. m.

JOHN FERGUSON, a witness called on behalf of the respondents, being duly sworn, testified as follows:

Direct examination.

Questions by Mr. WOOD:

Q. What is your business?

A. Steamboating.

Q. Where are you working?

A. I am not working at present.

Q. Where were you last working?

A. On the steamer "Ocklahama."

Q. Were you the master of the barge "Columbia" when she went down the river with this load of wheat that was lost?

A. Yes, sir.

Q. How long were you loaded when you started down the river?

A. They finished loading about half past five Wednesday night and started down at one o'clock Friday.

Q. Where did she lie meanwhile?

A. Part of the time at the Montgomery dock and part of the time at the company's dock.

Q. After the accident when you got around on the inside of the dock did you cause some wheat to be shifted on the barge "Columbia"?

A. I did.

378 Q. Why did you do that?

A. I considered it would give the engineer a better chance to work to pump the barge out.

Q. Was the barge on an even keel when you commenced to shift the wheat?
A. No, sir.
Q. What was the purpose then of shifting the wheat?
A. To bring the water underneath the siphon.
Q. Did you intend to get the barge on an even keel?
A. Yes, sir; I got her on an even keel.
Q. Then did you stop shifting the wheat?
A. I did.
Q. Who requested or ordered the shifting of the wheat?
A. No one.
Q. Did not the engineer Smith tell you that he wished you would bring the barge on an even keel that night on the forward part of the "Ocklahama," and Mr. Tackaberry being present, and none other, did you not then and there say to him that you wanted him to give you some men to help shift some wheat because Smith, the engineer, had told you to bring the barge on an even keel so that the siphon would work?
A. No, sir. I had asked him, I think, to give me some hands to shift the wheat, but that was all I asked him for.
Q. Did you see Captain Short or Peterson after they were killed?
A. I saw Captain Short after he was killed.
Q. Where was he?
A. In the square of the hatch.
Q. Was the wheat on him at all?
379 A. Yes, sir; he was jammed in with the wheat.
Q. You did not see Peterson?
A. No, sir.
Q. How much of Captain Short's body was out of the hatch when you saw it?
A. It was about half out.
Q. How high was the wheat originally piled on the barge?
A. Eight high forward and seven high after.
Q. Do you know what the dimensions of the barge are?
A. 190 feet long, 30 feet beam, 8 feet depth of hold.
Q. What is the dimension of the deck-house?
A. In height or length?
Q. Both.
A. 10 or 12 feet high and about 165 feet long and 25 feet from the stem to the forward end of the house.

(COURT:)

Q. The deck-house was how long?
A. About 165 feet long.
Q. The deck-house?
A. Yes, sir. The barge altogether was 190 feet long.
Q. How long had you been with the company at that time?
A. I guess between two and three years.
Q. Had you acted as pilotmaster before?
A. Yes, sir.
Q. For how long a time?

A. For two trips before that. I had been master of that same barge the season before.

380 Q. Had you had any other experience than this as barge-master?

A. No, sir.

Questions by Mr. LORD:

Q. Did you see Mr. Boyce at any time prior to the collision in the hold of the barge?

A. No, sir; Mr. Boyce was never in the hold of the barge prior to the collision.

Q. Prior to the accident, prior to the injury he received?

A. No, sir; not prior to his receiving the injury.

Q. When he received the injury?

A. Yes, sir, I saw him in the hold several times before that; twice.

Q. By whose orders did he go there?

A. I don't know, sir. Mr. Boyce was not in my office. I don't know who sent him there.

Q. You had requested assistance from the men on the tug "Ocklahama" to help you about that work, had you not?

A. To shift the wheat.

Q. You did not request any assistance in stopping the leak?

A. No, sir.

Q. Was the bulkhead built by your order or the captain's order?

A. I started to build it and Captain Short started down there after we had simply put a few boards across; I ripped the sacks of wheat in two.

Q. How much of a crew did you have?

A. One man and myself.

Q. He was a watchman, was he not?

A. Yes, sir. I hired eleven of the crew, but they were all discharged.

381 Cross-examination.

Questions by Mr. COTTON:

Q. Were you a licensed mate at this time?

A. Not at that time; no, sir.

Q. Had you been before?

A. Yes, sir.

Q. For how long a period?

A. About two years.

Q. Whereabouts?

A. On Puget sound and on the river here.

Q. Why was your license taken away?

A. For a flaw in my naturalization papers.

Q. Are you a licensed mate now?

A. Yes, sir.

Q. What is the usual crew which they run on a barge of this kind?

A. Just a master and watchman.
Q. How long had you been watchman on her before?
A. I had been watchman on her about all the season, off and on, before that; of course they don't run until just when there is a load to go down.

Excused.

W. J. BURNS recalled.

Questions by Mr. WOOD:

Mr. WOOD: I want to clear up a matter that I think the answers of the witness in regard to these damages may be in doubt.
Q. Mr. Burns, you said yesterday that the insurance company had paid you $16,000. Were you speaking exactly or from memory?
A. Simply from memory.
382 Q. As a matter of fact, have you since examined to see whether that is correct or not?
A. Yes, the amount is only about $15,000; a little over $15,000.
Q. Have you ever been reimbursed from any source for the items of interest, demurrage and stevedoring?
A. No.
Q. Who were the agents in this State for the insurance company?
A. We are.

Cross-examination.

Questions by Mr. COTTON:

Q. You had this cargo totally insured, did you; for how much?
A. We had the cargo insured for the amount that we recovered.
Q. Did you have any more insurance than that?
A. No.
Q. What was the exact amount that you had on it?
A. At the rate of $1.27½ per cental.
Q. You insured then the total value of the cargo?
A. Yes.
Q. And that was paid to you?
A. Yes, sir.

Redirect examination:

Q. Did you receive this insurance money before or after the beginning of this litigation?
A. After the beginning of this litigation.

Recross-examination:

Q. Before you filed your claim?
383 A. We received payment after we commenced the suit.
Q. Have you ever filed any claim in this case?
A. How do you mean filed a claim?
Q. Before Paul Deady.
A. Not that I am aware of.

Excused.

EDWARD TACKABERRY recalled.

Direct examination.

Questions by Mr. WOOD:

Q. Mr. Tackaberry, on the night of the collision of the barge "Columbia," after the collision, after you got around on the inside of the dock, did the master of the barge, Ferguson, come to you in the forward part of the "Ocklahama," yourself and himself being present and no others, and say to you that he wanted you to give him some men to help shift some wheat because Smith, the engineer, had told him to bring the barge on an even keel so that the siphon would work?

A. I could not say positively whether he said Mr. Smith had told him so, but that is what he referred to.

Q. When you say that you could not state positively, do you mean that he used the word "Smith," or the "engineer"?

A. I could not say positively, but he wanted to straighten the barge up so that the siphon would work.

Q. Did he say who told him to have it done?

A. No, I could not say positively.

384 Cross-examination.

Questions by Mr. COTTON:

Q. Do you know whether he stated that anybody had told him to do it, or that he just wanted it; is not that what he said to you?

A. He wanted it done. I suppose he had orders from some source.

Q. But he did not say anything about having any orders; he simply asked you to give him men?

A. He wanted men, yes, sir.

Excused.

Mr. WOOD: We offer in evidence the deposition of Mr. H. A. Matthews.

The COURT: What is the nature of the deposition of Matthews?

Mr. WOOD: Mr. Matthews was a member of the coroner's jury that held the inquest over the remains. It relates to the condition of the barge.

Mr. Wood also offers in evidence the deposition of William Chadwick, who was also a member of the coroner's jury, and whose testimony relates to the condition of the barge.

Also the deposition of J. H. D. Gray.

Mr. COTTON: I object to Mr. Gray's deposition going in on the ground that he is now present in court.

Also the deposition of R. M. Stewart, which relates to the condition of the barge.

Also the deposition of W. J. Barry which relates to the condition of the barge.

Also the deposition of William Cole, coroner, which relates to the condition of the barge.

385 The COURT: Do the petitioners desire to have Captain Gray examined now?

Mr. COTTON: Yes, sir.

Mr. WOOD: I object. I am not prepared to examine him intelligently. I don't know myself what he testified to.

The COURT: I think you have a right to that deposition. Let the deposition come in.

Mr. WOOD: While I do not think it necessary, still I will now apply to the court for leave to amend our answer so as definitely and specifically to plead in the answer, as an answer to their petition the incompetency of the master, and the rottenness and unseaworthiness of the barge. That is set up in general terms. If it is thought necessary to amend, I will ask leave to amend and state specifically the claim that we make in that respect, the incompetency of the master of the barge.

Mr. COTTON: I object, for the reason that there has been no proof, it seems to me, of any incompetency on the part of the master of the barge. I do not think they have proved anything tending to show that.

The COURT: I have no recollection of any proof that tends to show the incompetency of these men. Is there any proof that occurs to counsel on that subject?

Mr. WOOD: Yes, sir; I think that there is proof of that, to the effect that Captain Short had never been engaged in this particular line of work and was therefore not a competent man to take charge of it.

Application to amend denied.

Respondent-, Balfour, Guthrie & Co., rest.

386 Mrs. MARSHAL B. SHORT, a witness on behalf of the respondents, being first duly sworn, testified as follows:

Direct examination.

Questions by Mr. WATSON:

Q. You are the widow of the late Captain Marshal B. Short?

A. Yes, sir.

Q. When were you married to Captain Short and where?

A. I was married here in Portland on the 17th of November, 1889.

Q. You lived here up to the time of his death?

A. Yes, sir.

Q. What was Captain Short's age at the time of his death?

A. Twenty-six years, five months and sixteen days.

Q. What was Captain Short's condition as to health and strength?

A. He was very healthy and strong.

Q. What was Captain Short's occupation during the time that you and he lived together as man and wife?

A. He was mate until he got to be captain.

Q. Where was he engaged?

A. With the Union Pacific.

Q. What were his habits as to economy or otherwise; what did he do with his money?

A. He gave it to me.

Q. Did he have any extravagant habits?

A. Not as I know of.

Q. Do you know what he was earning during the time that you were married?

387 A. Sixty dollars a month; that is when he was mate.

Q. And afterwards?

A. $125.

Q. Did you see Captain Short after he was dead; did you see the body after the death?

A. Yes, sir.

Q. How long afterwards?

A. Until he was buried.

Q. He was brought here to Portland, was he?

A. Yes, sir.

Q. You are the administratrix of his estate?

A. Yes, sir.

Cross-examination.

Questions by Mr. COTTON:

Q. When he was captain, Mrs. Short, was he at work regularly every day all of the time, or were there intervals when he was not working?

A. Regularly.

Q. You don't know anything about the character of the work which the "Ocklahama" was doing, that is how long she was busy or employed?

A. No, I know nothing about it.

Redirect examination:

Q. Mrs. Short, how long was your husband captain, do you know?

A. I don't know; two months, I guess; maybe not that long.

Q. Previous to that time he had been mate?

A. No, he was not two months; six or seven weeks.

Q. Do you know where he had been running previous to the time that he was captain?

A. No.

Excused.

388 S. ANDERSON, a witness called on behalf of respondents, being duly sworn, testified as follows:

Direct examination.

Questions by Mr. WATSON:

Q. Are you the administrator of the estate of August Peterson, deceased?

A. Yes, sir.

Q. What relation, if any, was August Peterson to you?
A. He was my nephew.
Q. His mother was your sister?
A. Yes, sir.
Q. How old was August Peterson at the time that he met his death in this disaster?
A. I think he was a little over 20 years old.
Q. Do you know how long he had been in this country?
A. He had been up here four years this last spring.
Q. What was August Peterson's condition as to health and strength, if you know?
A. He was a young man, strong and healthy.
Q. What was he engaged in generally?
A. He worked for the company off and on for three years.
Q. On the river?
A. On the river, yes, sir.
Q. Do you know what his habits were as to saving or squandering his money?
A. He was good and industrious, always working when there was work to be got, and it seems that he always had work.
Q. Did August Peterson save up any money during the time that he was here, if you know?
A. Yes, sir.
389 Q. How was it in reference to his savings; did he save a little at a time, or did he not?
A. He helped his mother all of the time; his mother being a widow with four children, he helped her right along.
Q. Do you know to what extent August Peterson helped his mother after he came here?

Mr. COTTON: I object as immaterial and not the proper measure of damages.
The COURT: The testimony may come in subject to the objection.
Mr. COTTON: It is understood that I save all exceptions to Mrs. Larson's claim.
Mr. WATSON: Certainly.

Q. What was the name of August Peterson's mother?
A. Her name is Mrs. Larson.
Q. Anna C. Larson?
A. Yes, sir.
Q. And she has been a widow how long?
A. She has been a widow thirteen years.
Q. What is the condition of her health?
A. Her health was broken down. Her husband died and she had to work hard all of the time to support the children. When they got grown up so that I could get this one out he came out here and he took it in hand to support his mother.
Q. You had furnished Mrs. Larson's support, had you, previous to that time?
A. I did before he came out here, five years.

Q. Do you know how much August Peterson furnished his mother on an average?

390 A. That I could not say, but I have got some receipts here that will show; the postal money orders sent were from ten to fifteen dollars a month.

Q. Do you know what August Peterson's intention was with reference to continuing to support his mother?

Mr. COTTON: I object.

A. That is what he said when I brought him out here, that he was going to help his mother as long as he lived, when he was able to do it.

Q. Do you know about how much August Peterson was earning per month at the time of his death?

A. When he worked for the company I believe he earned $40 a month.

Q. Did August Peterson accumulate any property here outside of the money that he sent back to his mother?

A. Yes, sir; he bought a lot in Highland park, I believe, and paid $200 on it.

Q. Did you see August Peterson after he was dead?

A. Yes, sir; I saw him on Monday morning.

Q. He was buried here, was he?

A. Yes, sir; he was buried here.

Cross-examination.

Questions by Mr. COTTON:

Q. How long did you say you had sent money to Mrs. Larson?

A. The first money he earned after he came out——

Q. (Interrupting.) How long did you send money to Mrs. Larson?

A. About five years before August Peterson came out here.

391 Q. Then you stopped sending money to her?

A. Then I stopped, because I had my own family to support, and this young fellow took it in hand to support his mother.

Q. Peterson was not married, was he?

A. No, sir.

Excused.

The respondent, Anna C. Larson, rests.

WILLIAM BOYCE recalled on his own behalf.

Direct examination.

Questions by Mr. LORD:

Q. Mr. Boyce, how has this injury affected the strength and lifting power of your arm?

A. The bone is broken off altogether, and there is about half an inch from the place where it belongs, and when I lift all of the strain comes on this corner (indicating) of my arm—that is, if there is any weight there.

Q. When you lift which way do you mean?
A. When I lift down (indicating) this way.
Q. Now, how does it affect your arm when you go to lift up this way (indicating)?
A. I can't lift up any more than this (indicating).
Q. You can't lift up any higher than that?
A. No.
Q. Can't you take your hat off with that hand?
A. Yes; but I can't lift up anything heavy, any more than that (indicating); I can't get it this way, because the joint is broken here altogether.
Q. You can't straighten your arm out that way?
A. No; I can't.

392 Q. To what extent—that is, as near as you can judge, is the lifting power of your arm gone? If you could lift 100 pounds before, how much can you lift now?
A. I could lift 400 pounds very near when I was all right.
Q. Have you made any attempt to see how much you can lift recently?
A. Yes; I have tested myself.
Q. What is the result?
A. You mean now?
Q. Yes.
A. I can lift a chair up.
Q. Can't you lift anything heavier than a chair?
A. Not in that way (indicating). I can lift a chair up that way (indicating).
Q. You don't mean to say that you could lift 400 pounds up that way (indicating) before your injury?
A. Yes; when my arm was good.
Q. Up that way (indicating)?
A. With both hands.
Q. Have you tried now to see how much you can lift with both hands?
A. Yes; I can lift hardly anything at all. All of the strain comes here in this corner of my arm, the joint.
Q. It makes pain which compels you to release your weight?
A. Yes, sir; and always when I am walking if I *I* have got my arm down there in a steady strain on it all the time. These cords seem to be drawn up.
Q. Previous to this accident what had been your physical health?
A. In first-rate health all the time.
Q. How old are you?
A. 26.

393 Cross-examination.

Questions by Mr. COTTON:

Q. You don't mean to say that you could lift 400 pounds that way (indicating)?

A. No, I could lift 400 pounds up this way (indicating) very near when I have got both hands.

Q. Now you can't lift a chair up. Is that what you mean?

A. Up this way (indicating), but I can't get the arm straight.

Excused.

Mr. LORD: I ask leave of the court to amend in one particular in regard to the unseaworthy condition of the barge. In the cross-libel which is filed here there does not appear to be any allegation touching that point and the proofs seem to be pretty strong. I also ask to amend as to the shifting of the wheat while the barge was attached to the dock a few moments before the overturning.

The COURT: What kind of an allegation do you wish to make with reference to the shifting of the wheat at the dock? Do you want to allege that as the approximate cause of this accident?

Mr. LORD: Not particularly just yet, but as an act of negligence that resulted—a part of the transaction.

The COURT: You want to amend by alleging the unseaworthiness of the boat; and you want to allege that the shifting of the cargo by Ferguson was an act of negligence, do you?

394 Mr. LORD: I desire to allege that the shifting of the cargo was a part of the transaction which resulted in the accident.

The COURT: It is not necessary to allege matters that tend to elucidate and explain the situation.

Mr. LORD: I do not desire to make any allegations in that matter, but the proof has been introduced, I think that that would be an act of negligence.

The COURT: Do you want to allege that as an act of negligence?

Mr. LORD: Yes, sir.

The COURT: Negligence on the part of Ferguson, for which the company was responsible and which was a cause of this injury. The amendment may be made.

Respondent, William Boyce, rests.

*Petitioners' Case.*

J. H. D. GRAY, a witness on behalf of petitioners, being duly sworn, testified as follows:

Direct examination.

Questions by Mr. COTTON:

Q. What is your business and occupation at the present time?

A. At the present time I am in the real-estate business at Astoria.

Q. How long were you in the steamboat business?

A. From 1858 to 1888.

Q. On what rivers?

A. On the Columbia river from its mouth to its headwaters, and on the Frasier river and Puget sound.

395 Q. What was your business when you were on the Columbia river, more particularly?

A. Master of steamers and vessels.

Q. Did you have any connection with towing or operating barges engaged in that business, in any way whatsoever?

A. Yes, sir; I was engaged in that business, in building and operating from Portland to Astoria for the Columbia River Barge Company, and the "Columbia Chief" was the particular barge I operated, as part owner and manager.

Q. State whether or not the "Columbia Chief" was a barge similar in construction to the barge "Columbia."

Mr. Wood objects as incompetent and immaterial.

A. She is very similar.

Q. How long were you connected with her in towing her?

A. Something over two years.

Q. You have already testified in this case, have you not, in regard to an examination that you made of the boat as she lay by the dock at Astoria?

A. Yes, sir; I made a casual examination in looking from the dock down on the boat, just what I could see above the water. That is what I testified to.

Q. Have you made any examination since?

A. Yes, sir.

Q. How long ago?

A. It was last week, I believe, five or six days ago.

Q. Where were the parts of the barge that you examined at that time?

396 A. They were lying on the beach, at Smith's point.

Q. About how far is that from the dock at Astoria?

A. About two miles.

Q. Just describe what part of the boat you saw down there, and what their condition was.

A. I was requested by the gentleman representing the libellant to go down and examine it; that they thought I had given my testimony before probably from a superficial examination and asked me what I judged from, and I told them, and so I went down and looked at this vessel. When I testified formerly I was under the impression that when the barge was wrecked she had never been salted. In building vessels of this kind, river steamers or barges of that character, by putting salt around the tops of timbers and encasing it, putting it in a box there; that protects the timber from seepage and dampness the whole distance, when put around the whole of the boat, it protects the timbers on the outside and the ribs. I was under the impression that this barge had never been salted, and I testified that from what I could see in this one place, it was comparatively rotten. When I went and looked at her and examined her down there, I found that the boxes that held the salt were still there and that the timbers were sound comparatively. I looked all over the side of her—she was lying on the beach—and it astonished me, the appearance of the side. I did not see the stem this time; I saw that floating when they were towing it down; I

was looking at it in the water, and I judged from that that it
397 had been slided in as it came against the dock and the timbers, but I did not see anything there to make a very careful examination, but along the side where the timbers knuckle, in the knuckle the weight of this wheat when the boat listed over and struck the bottom alongside of the dock—to my mind the weight carried and slided these timbers from one end to the other. The probabilities are that the——

Mr. Wood objects to any further statement.

Q. What was the condition that you found the timbers in that were broken off?

A. The timbers were sound.

Q. How many of them could you see?

A. I think I counted 19 or 20 of them that were broken.

Q. How much of this side did you see?

A. I should judge 110 to 120 or 130 feet.

Q. Out of what part of the boat?

A. That was from the transom, aft, forward. It was the whole side from aft forward, making 120 or 130 feet perhaps, in that vicinity.

Q. What is the name of those broken timbers that were broken off?

A. Knees, natural crook.

Q. What they call the frames?

A. Frames.

Q. About where were they broken?

A. Right in the bilge, about where they turn up, in the bilge of the boat.

Q. Did you see any other portion of the barge besides this side piece?

A. I saw the bottom, the bottom of the barge.

Q. What was its condition?

A. About the same as the sides. The bottom of a barge,
398 of a craft, will always be sounder than the transom, or the part between wind and water, but you take any of these old vessels and they are always sound in the bottom.

Q. How many of these knees in the side of the bottom did you examine about?

A. I should judge in looking them over, that there were fifty or sixty; there were nineteen that I counted on that side that were broken, I think nineteen.

Q. How were they situated in reference to each other?

A. There were probably six or eight broken along in one place, and I think probably four or five in another, and three or four in another. They were scattered all around.

Q. But they were all there, except those right along in the same row, were they not?

A. Yes, sir, on the same side.

Q. In what part of the boat?

A. About one-third of the way forward, say about sixty or eighty feet from the stern; from that forward perhaps one hundred feet.

Q. What was the dimensions of these knees, do you know?
A. In the throat where they broke I think from three to four inches; about eight inches, I think, eight or ten inches in depth.
Q. State whether or not these knees were similar to those which are used in barges of this class generally.
A. They are the ordinary knees that are used in that class of barges.
Q. What was the condition of her planking?
399 A. The planking, as far as I could see, was apparently good.
Q. How close were you to these pieces when you made the examination?
A. I was looking right at them, standing upon the wreck, at the side.
Q. Was she out of the water where you could examine her?
A. Yes, sir.
Q. Where you could touch the pieces?
A. Yes, sir.
Q. Did you see any part of her stern?
A. I saw part of her transom, yes, sir.
Q. What was its condition?
A. That that I saw was apparently sound.
Q. Did you examine these pieces closely?
A. Yes, sir.
Q. Will or will not this salting process preserve a boat?
A. It does not preserve a boat; it preserves a vessel. You asked me — a boat, did you?
Q. A boat.
A. It preserves a boat, yes, sir; it preserves the wood.
Q. Is it used on boats generally in these waters?
A. I think it is; all that I have ever had anything to do with it is used upon, but some do not. It saves the life of a boat. It makes it at least double what it would be ordinarily, in my opinion.
Q. Now, Captain, referring to these knees which were broken off, and coming particularly to the top ends of them, where the
400 deck was fastened and the sheer strake and clamp, what was the condition of the timbers there?
A. Those that I saw this time were all sound. When I looked at it before there was a place right near the bow where there had been new pieces put in, but at this last examination all that I saw was apparently sound.
Q. About where were these pieces which you saw when you made your first examination?
A. Right near the bow; about 20 or 30 feet from the bow.
Q. How located, with reference to any particular part of the boat?
A. I should judge that it was right near the gangway; the forward gangway on the starboard side.
Q. Near the hog chains?
A. Yes, sir; near where the hog chains fasten to the boat.
Q. I would like to have you describe that piece. What side do you say it is?

A. It is lying there on the beach; it is the port side.

Q. That is the left-hand side?

A. Yes, sir.

Q. I would like to have you describe the size of that piece which is lying there at the present time, more particularly with reference to whether it is still fastened together; that is, that side.

A. The piece that is there, as I said before, represents the one-half, the port half of the boat. I suppose it was set right up through this building, and a flat-bottomed boat setting on the floor
401 you would bring that half over about 120 or 130 feet long, as near as I could judge.

Q. How much of the bottom did you see there?

A. I should say half or two-thirds of it. I did not take particular notice. I was just simply looking to see if I could see any rotten wood. I was asked to correct my former testimony and I wanted to see if I was correct about it. I don't know how much there was of it.

Q. What was the condition of her keelsons?

A. Her keelsons were sound as far as I could see.

Q. How about the bilge strake?

A. The bilge strake was sound. I did not see any rotten wood at all.

Q. Do you remember a piece that was sawed off from the stern?

A. I don't recollect whether I saw such a piece or not. I believe my attention was called to it, but I believe I was looking at something else. Mr. Long asked me if I had seen that, but I did not see any rotten wood on that when I went down to look at it.

Q. Did you examine all the pieces down there?

A. Nearly all. I saw these pieces, but I don't recollect whether I saw the piece you refer to or not.

Cross-examination.

Questions by Mr. WOOD:

Q. Captain, how far is Smith's point from the place of the original collapse, where you saw the wreck?

A. About two miles.

Q. And this remnant of the barge you say was lying high and dry?

402 A. Yes, sir; the water was washing up underneath it; we could walk around it; the water had not got on it. It was not resting on the bottom side.

Q. Do you know how long it had been lying there?

A. Not exactly. I think it had been there something like a couple of weeks, perhaps. I saw it near the wharf floating around the bay there, perhaps a month before that, but I don't know when it was taken down there.

Q. Where were these salt boxes, on what portion of the boat?

A. Generally right along down the top of the timbers; sometimes a foot or two feet; generally never less than one foot to three feet from the top of the timbers between the clamp strake and the sheer

strake on the outside, and they put on perhaps another streak of salting inside of that and boxed it up, below.

Q. They are never in the water?

A. No, sir.

Q. Never supposed to be?

A. Not supposed to be.

Q. And they are nowhere near the bilge strake?

A. No, sir.

Q. You say that this boat is, as it were, split in two, and you saw the port half of her?

A. Yes, sir.

Q. Do you know whether or not she was split in two at the time the wreck occurred?

A. I am positive that is the time. I saw the wreck the next morning, probably three or four hours after, about seven o'clock in the morning, after the wreck. It is impossible to have broken the wreck in two in any other way than with the heft of this grain.

403 Q. What I mean is, it was not the half of the barge that had been taken out by the company, but the fragment as left by the wreck?

A. Yes, sir.

Q. So that the barge itself in wrecking had split asunder?

A. Yes, sir; the weight of this grain on the barge when she rolled over and struck the bottom smashed the sides out of her.

Q. Now, which way was the barge lying in reference to fore and aft, when she was wrecked alongside the dock. How was she headed?

A. She was headed to the west, down river.

Q. Down river?

A. Yes; inside of the wharf.

Q. So that this side that you saw would have been the inside in the capsize?

A. Yes, sir.

Q. Where are the knuckles that you speak of?

A. Where they turn up there the bottom is flat and the knees turn up.

Q. And the turn of the knees is called the knuckle?

A. Yes (illustrating); just the same as if that was the knee and it broke off there; this is the bottom of the boat.

Q. That would be the knuckle?

A. Yes, sir.

Q. Indicate on the plat just about where that would be.

A. (Referring to plat.) That is just a midship section. Now suppose that was the bow that way, what I saw this last time was broken off right here (indicating). This is not a midship section; that is near the stern; that is where it commences to turn up.

404 It broke off right in here (indicating); this part that I am referring to now broke off there (indicating), that is, the house on top, and this is the deck (indicating). Here are the guards and when the boat lay against the dock on that side she rolled over this

way (indicating), she struck the bottom here (indicating) and the heft of this grain on her smashed this right over (indicating).

(Redirect:)

Q. That is a cross-section taken out from the middle?

A. Near the middle division.

Q. It would be pretty near flat there?

A. Sharp forward and like a stern-wheel boat aft.

Q. You said you saw from the transom forward, about 110 feet of the frame. There was none of the bow nor of the stem there when you examined it, was there?

A. I said from 110 to 130 feet. The bow itself, the run where she commenced to sharpen, was not there.

Q. And not all of the stern was there, was it?

A. It was lying in the other piece that Mr. Cotton referred to, I think all of the transom, at least the bottom of the transom where it came up.

Q. But the entire transom clear to the top was not there, was it?

A. No, sir.

Q. Did you examine the condition of the irons and bolts especially?

A. Yes, sir.

Q. In what condition did you find them?

A. Those that I saw were comparatively good for the time she had been knocking around; there were some of them that were a little eaten.

405 Q. Did you see any of the deck there at this time?

A. I don't recollect that I saw exactly; I think I saw some of it, but not specially.

Q. Did you make any special examination of that?

A. No, not particularly.

Q. In this examination that you made recently here, did you come across any rotten wood at all?

A. I found some that was on the inside of one of the timbers, but not enough to amount to anything.

Q. You say you saw some rotten wood?

A. I saw some sap; the knees are usually cut out of timber; there is sap in them, and that rots them.

Q. Did you see any rot about the transom?

A. I don't know as I did. I would expect to; if I had examined them as carefully as I did the other I might have found it; that is where they usually find rotten wood in boats of that kind.

Q. You are not prepared to say that from your examination there was no rotten wood in the transom?

A. No, I could not say that; I did not see any when I went down. I went down, finding the rotten wood that I saw up to the dock, the pieces, to convince myself, and I supposed, of course, I would find the barge much more rotten than I did, and that means I was looking more specially for that part that I had seen before when I testified.

Q. Who was with you down there in the examination?

A. Mr. Long, and I think in company with a couple of gentlemen that I have met here.

406 Q. Mr. Lounsberry?

A. No, Mr. Long, I think, and some other gentlemen.

Q. How long were you there?

A. We were there probably a half or three-quarters of an hour.

Q. You say that you have been specially engaged in the barge business?

A. Yes, sir.

Q. Is it not a fact that a barge engaged on this river is expected to be beached and take the ground sometimes?

A. Yes, sir; that is, a barge if she is properly beached would be supposed to hold her load.

Q. So when you saw this fragment, what then and there, if any, were the evidences of repairs or putting new material into her?

A. At the time, right after the collapse in October, I was looking from the dock and walked down over the barge and I could see where there had been new timbers run up alongside of the old timbers, and I suppose the beams had been turned along this place forward probably a distance of half as long as that table.

Q. My question was if you on this last examination saw any new material?

A. No, I don't think that I did.

Q. Did you make any special examination of the condition of her bolts and iron this last trip?

A. I looked them over, looked at some of them. Some of them were rusty somewhat, but not to any great extent.

407 Q. Now, is it not a fact that the old wood in ships, especially where it has been above the water may, to the eye, present all the appearance of soundness on the outside and be punky and unsound within.

A. Yes, sir.

Q. In making this last examination did you simply walk around and carefully scrutinize this barge, or did you go as a shipwright would and make a particular examination by tests of her parts with tools, instruments?

A. There was a gentleman along with us and I think Mr. Long there at one or two places gave me a knife and let me cut into it along on the starboard quarter or port quarter that I saw. I did not take an augur and go through it in the way I should if I had been making a regular examination aboard a vessel, but wherever we cut we found the wood comparatively sound.

Q. Were there any appearances of the wreck having been stripped before she was hauled down there?

A. As far as that is concerned, I don't know. This piece was clear of the rubbish.

Q. Was there rubbish there that had been taken from this?

A. No; I think that had been taken off up near town, the deck-house.

Q. Where was the other side of the barge, do you know?

A. No; I don't know, some part of it was out alongside of the

408 Redirect examination.

Questions by Mr. COTTON:

Q. Captain, did you examine the flat surface presented by the break or these timbers that were broken particularly?

A. Yes, sir.

Q. Did you go over them carefully and examine them?

A. I went over them carefully and saw them cut and cut some myself.

Q. What was their condition?

A. They were sound.

Q. Do you know where this wreck had been during the last year?

A. It has been lying there right down in the bay near the coal bunkers, just inside of the coal bunkers.

Q. In salt water?

A. Yes, sir.

Q. Is this side that you refer to all broken up, or is it lying there connectedly together?

A. It is lying there whole—that is, all in one piece.

Q. At the time that you examined it, what was the condition of her deck; was that all broken in splinters, or was it more or less intact?

A. This piece that I saw now?

Q. No; this piece that you saw right after, the deck?

A. The deck was all whole, excepting one place right forward, near the forward part there, where it would be torn away by the hog chains; that was all together.

Q. What did you think about the deck at the time you examined it—that is, the first time—that is, simply of the deck I am referring to, and planking in that?

409 A. The deck is not where vessels give out; it is in the hull, and the deck apparently was all solid.

Q. That is right after the injury when you looked at it?

A. Yes, sir. This collapse was caused by the vessel rolling over and striking this bottom, and the weight of the grain with this momentum smashed the side over; the deck might have been brand-new and that would not have affected it; in my opinion it was the breaking up of that five or six hundred tons, or so, sideways on the vessel.

Excused.

N. J. BLAGEN, a witness called on behalf of petitioners, being first duly sworn, testified as follows:

Direct examination.

Questions by Mr. COTTON:

Q. What is your occupation?

A. General contractor and builder.

Q. How long have you been engaged in that business?

A. Seventeen or eighteen years.
Q. In wood-work?
A. Yes, sir.
Q. Do you know what wood is when you see it?
A. Yes, sir.
Q. Are you in the habit of judging of the qualities and strength of the wood?
A. Yes, sir.
Q. Did you at my request visit the barge "Columbia" some time ago and examine her?
A. Yes, sir, I did; that is, I visited the wreck, what was explained to be the one.
Q. In whose company did you go?
410 A. I went with Mr. Long and Mr. Lounsberry; I can't recall the other gentleman's name now.
Q. Where did you find the parts of the barge?
A. I found it below Astoria, around what is called Smith's point, there in Young's bay, on the beach.
Q. How much of a piece did you see of the side of the barge?
A. I saw one piece about 130 or 140 feet long; it might have been a little longer or a little shorter; somewhere about there.
Q. Referring to that diagram, about where would that piece that you saw commence, and what was it?
A. Is this looking at the boat from the stern?
Q. Just indicate about how much of its side you could see.
A. Looking from the stern?
Q. Yes.
A. I saw the whole of it, but I presume the piece that you refer to was away down to about here (indicating), a part of it.
Q. From the top of the frame down to the bilge strake?
A. Yes, sir.
Q. Right below the bilge strake?
A. Yes, sir; a part of it ran down a little further, down probably to there (indicating).
Q. Still further away from the bilge strake?
A. Yes, sir, two or three feet.
Q. Towards the keel?
A. Yes, sir.
Q. Was the planking attached to those frames?
A. Yes, sir; comparatively all; there might have been a piece off, but generally speaking it was all attached.
411 Q. Just describe the appearance of that piece, not with reference to its character as wood, but simply as to its character as part of the barge; that is, what was there, how much of it was fastened together?
A. The whole side was fastened together down to about this crook there (indicating).
Q. What is known as the sheer strake up above, bolted on the top of the frame?
A. This timber here (indicating) you have reference to?
Q. No; the sheer strake.

A. That was bolted on there.

Q. Were the sheer strake and the clamps, these two pieces of timber, on each side of the frames?

A. Next to the top?

Q. Yes.

A. They were both there.

Q. They were all there, were they?

A. There might have been a little piece off there, but generally they were all there.

Q. Now, were those bolts and fastenings all there or were they broken?

A. They were intact, I think, as far as I saw.

Q. And the planks along there, were they on this piece, this entire side, or were they broken off?

A. They were on generally.

Q. Describe generally the condition of those timbers, what they were like, so far as wood is concerned, what examination you made of them, and how you made it?

A. I took quite a large ax that I had and chopped into it until I found such parts of the timber as I wanted to see, that I
412 was perfectly satisfied with its condition. Out of that timber, the crooks or knees I found two or three that were somewhat decayed; the rest of them were in a very good condition, practically sound; there might have been a very small amount of decay around next to the plank of half an inch or such a matter, but all the rest of it was practically as sound as new timber. The other timber, the piece——

Q. (Interrupting.) What other piece? Just name them by name.

A. That is more than I can do. The piece that is nailed on from here (indicating), from this point on the knee, from the bilge, as you call it, running down this way (indicating).

The COURT: Mr. Wood, you are an expert in the technique of the business. Will you describe the timber as he has decribed it?

Mr. WOOD: I think the witness is referring now to the bilge strake.

The WITNESS: I am referring to the timber from here to here (indicating).

Mr. WOOD: That is the knee.

Q. The lap piece, the piece that is lapped over, is it?

A. Yes, sir; that lap (marked "A") I should say was half decayed, quite a part.

Q. Referring to the break, about the center of the barge, did you notice any pieces broken off?

A. Do you have reference to where the side broke off from the main barge right along?

Q. Yes, where the side broke off from the main barge.

413 A. Yes, sir; the knees were broken off; quite a number of them; I should say fifteen or twenty; I did not count them.

Q. Not the lap pieces, but the knees.

A. No, sir; I did not find any lap pieces that I remember that were broken.

Q. While they were rotten; they were not broken?

A. I did not find any.

Q. But the break occurred in what?

A. Right in the knees.

Q. Did you chop into the knees?

A. I did, considerable of them.

Q. How many of them?

A. Pretty near every one in the boat.

Q. And you found those knees in what condition?

A. I found them in what I call pretty sound condition. As I said before, I found three of them, two or three, that were decayed somewhat; they were not rotten, they were decayed somewhat. The rest of them were very sound, with the exception that there might have been a half inch, or such a matter next to the plank that was decayed; yet there was very little that I could see that was decayed to amount to anything.

Q. Some of them?

A. Just some of them; yes, sir.

Q. How far did you chop in?

A. I chopped in far enough to get through the blackened timber; the outside of all timbers that have been exposed get dark; not necessarily rotten, but dark, and in order to see what condition the timber is in, it is generally necessary to cut through that. I
414 cut through that and got to fresh timber everywhere, and some places one and a half and some places two inches and some places three or four inches.

Q. What about the strength of this black timber?

A. Do you have reference now to the knees?

Q. Yes.

A. That was all strong, with the exception of those two or three knees that I mentioned before, all in good state of preservation.

Q. Does the mere fact that it is blackened decrease its strength?

A. No, it does not decrease its strength, because under such circumstances, with water and salt, that timber will blacken, in less than six months, I should judge.

Q. Did you see any piece there which was part of the bottom of the barge?

A. Yes, sir.

Q. How much of that did you see?

A. The whole of it, I believe.

Q. Did you test the knees in that?

A. Yes, sir.

Q. In what way?

A. By chopping into them.

Q. In what condition did you find them?

A. I found them generally in a very good state of preservation.

Q. Those were part of the same pieces that you saw in the side?

A. Do you have reference to part of the lap pieces?

Q. No, part of the knees.

A. Part of the knees; yes, sir.

Q. Did you find any lap pieces broken?

415 A. I don't remember of any lap pieces that were broken; I found some lap pieces that were somewhat decayed.

Q. How much of an examination did you make of the bottom of the barge in respect to these knees?

A. I went all over it from one end to the other, first one side and then the other, and chopped into it and hammered into it.

Q. Where were these lap pieces—were they in the side or in the bottom?

A. They were in the side.

Q. Did you see any part of the large pieces which are indicated in that section there, called keelsons; did you see those?

A. If you will show me on the map what pieces you have reference to I will answer.

Q. (Indicating on the map.) These pieces here. You remember a section was sawed off there that was lying in the bottom?

A. Yes, I remember that, but I don't remember seeing any of those pieces; I saw these pieces there up to that (indicating).

Q. What was their condition?

A. They were in good condition so far as I examined them. I examined pretty near all over them, chopped into them in different places.

Q. How was the planking on the bottom and sides of the barge?

A. I think there is some little decay about the planking; generally it was pretty sound, but I found some places that were decayed somewhat.

416 Q. What was the condition of the top of those frames, right where they come up to the top of the clamps?

A. They were sound so far as I could see, and I examined nearly every one of them.

Q. That is right where the deck goes onto the boat?

A. Yes, sir.

Q. What was the condition of the sheer strake and the clamp strake that was bolted across the tops of the frames?

A. I don't know that I examined that particularly; only I know it was there. You have reference to this piece here (indicating)?

Q. Yes.

A. I examined it and it was there and bolted on, but I chopped into it at one place. I believe it was sound there, but I think that was the only place I chopped in it.

Q. What was its appearance; was it still fastened on?

A. Yes, sir.

Q. And these pieces were still intact?

A. Yes, sir.

Q. Was this whole frame connected, this whole side piece connected?

A. Yes, sir, from one end to the other.

Cross-examination.

Questions by Mr. WOOD:

Q. Mr. Blagen, you are not a boat-builder or ship-builder?

A. No, sir.

Q. How long ago was it you made this examination?

A. Last Wednesday.

417 Q. You said something about finding the whole side there. What do you mean by the whole side?

A. I did not say I found the whole side. I was asked if it meant this side that was broken off down here from one end of the boat to the other, and I said I did see the whole side to the extent of where it is broken off.

Q. Then you did not mean to say that you found the whole side of the boat from stem to stern?

A. No, sir, I did not mean to say that and I did not say that.

Mr. WOOD: Possibly you did not. I may have misunderstood you, I wanted to get it correct.

Q. Then you stated again where the side broke off from the main barge. I wish you would explain what you meant by that.

A. I meant from what I was told by the gentlemen that were there to show it to me, that the break occurred at this side, went down first, and it broke off here (indicating) that is, where the break is now. (Witness points to the dark mark on the diagram near the bilge marked "B.") That might vary a little one way or the other, perhaps.

Q. That is what you meant then by saying that is where the side broke off from the main barge, is it?

A. Yes, sir; about there; that is, a part of the way; it did not break all the way; it broke promiscuously, it broke where the knees are; that is where it is broken.

Q. I don't understand that you say it broke promiscuously. Explain what you mean by that.

418 A. Where the knees are broken, these crooked pieces here (indicating) broken until about that place; other parts where this whole timber has spread and come apart, away down here; consequently, the break does not occur from one end to the other perfectly straight; part of it is broken here and part down there, and I don't know but what some is broken here (indicating).

Q. Where on the diagram that is marked "C," Blagen, is a separation of the joints, not a fracture?

A. Yes, sir.

Q. Describe about the separation or pulling apart of the joints; how was that?

A. I don't know anything about it, only that it simply parted there.

Q. You don't know except that it was parted? Did you see the fastenings?

A. What do you have reference to?

Q. The bolts or pins, or anything which fastened the joints.

A. There were no bolts there to fasten it together.

Q. None at all?

A. No, sir; that is not fastened with bolts; as I understand it, they are spiked together.

Q. Were the spikes drawn out?

A. Some of them were, I think, and some were rotten, and some I think were broken off.

Q. Did you make any particular examination of the stern?

A. Yes, sir.

Q. And how far up above what would be the water line, if she were afloat, did you find timbers of the stern?

419 A. Do you have reference to the extreme stern end of the boat, the very last timber?

Q. The very end of it, the very last timber.

A. I don't think that that is there, except the bottom piece. I examined the bottom piece right here (indicating) the same as if this would be the stern of the boat. I examined the bottom of that, but I don't remember now of these timbers being there at all, running up; that is the very last one; I don't think it was there.

Q. Did you see any portion of the deck?

A. Yes, sir; I saw practically the whole of it; it was lying there in the water.

Mr. COTTON: I would like the privilege of examining the witness as to the stern.

The COURT: You may re-examine him.

Q. Did you examine any of these stanchions or boards?

A. Not that I remember of.

Q. Any of these braces (indicating)?

A. I don't think that they were there; yes, sir, some of these braces were there; I examined some of them.

Q. How many of them were there?

A. I don't know; I did not count them and I could not say.

Q. About how many, in the length of the structure; were they all there?

A. I could not say as to that; I walked across some of them, and chopped into some of them; I could not say how many were there.

420 Redirect examination.

Questions by Mr. COTTON:

Q. How much of the deck did you see?

A. I saw practically the whole of it. It is a little ragged in the front end, a little piece off of the front end, but generally speaking——

Q. (Interrupting.) Where does it lie?

A. Alongside of that trestle.

Q. Does it float?

A. Yes, sir.

Q. Did you walk around it?

A. Yes, sir.

Q. It is still intact so that you could walk on it?
A. Yes, sir.
Q. Any timbers underneath it?
A. Yes, sir.
Q. What are they?
A. I suppose the regular deck timbers.

(Recross:)

Q. Do you know whether they are the timbers that belong to the deck?
A. Yes, sir.
Mr. WOOD: You said you supposed they were.
The WITNESS: What I meant by that is, that I am not a ship-builder nor a boat-builder.
Q. It is lying there just like a little raft, is it not the top of it?
A. Yes, sir; all fastened up together.
Q. But broken a little in spots?
A. Yes, sir; in a few places it is broken up a bit.
Q. Did you see where new spiking and new timber had been put in, and it had been fastened on to the hull?
A. Yes, sir; there were new timbers; that is, timbers had been put in after the original ones that were put in right alongside of the timbers and fastened through, and practically all around, so
421 far as I could see, they were put all around the boat on the inside, from the inside, in a piece; just how far they ran in I could not tell, but they ran in from the outside, somewhere in here (part marked "D").
Q. You are referring to where this break occurred; that is, where there were quite a number of pieces broken?
A. Yes, sir.
Q. How many of these pieces were pulled out and how many were broken in that particular point to which I called your attention?
A. You mean where this break occurred, along the bottom, you say?
Q. How many were pulled out and how many were broken, comparatively?
A. I should think fifteen or twenty of them were broken, and the rest, as far as I remember now, were pulled off.
Q. How many?
A. I do not know, I did not count them all.

(COURT:)

Q. A half a dozen?
A. A good many more than that—a good many more.
Q. Right in the center?
A. No, right in the center they were nearly all broken.
Q. There were fifteen or twenty broken right in there, were there not?
A. Yes, sir.
Q. Practically without any broken ou ?

A. Yes, sir; occasionally they had separated in the joints.

Q. But right through the center there they had practically all broken off short?

422 A. Practically they had all broken in the crook of the knee.

Excused.

JOHN RUTTER, a witness called on behalf of petitioners, being duly sworn, testified as follows:

Direct examination.

Questions by Mr. COTTON:

Q. Mr. Rutter, what is your occupation?

A. Ship carpenter.

Q. How long have you been a ship carpenter?

A. About thirty-five years.

Q. Where are you working at present?

A. For the Government at Fort Stevens.

Q. What are you doing there?

A. I am repairing some barges.

Q. Of the United States?

A. Yes, sir.

Q. Where do you live?

A. Astoria.

Q. What part of Astoria?

A. Smith's Point.

Q. Have you got in your possession any parts or portions of the old barge "Columbia"?

A. Yes, sir.

Q. What have you got?

A. I have got the bottom of one side of the deck.

Q. When did you get them?

A. One side I got last Sunday, and the bottom has been there, I should judge, about two weeks, also the deck, two or three weeks.

Q. How did you happen to get possession of that?

A. They asked me to take them and tear them to pieces,

423 because they were in the way at Scow Bay or up there at Astoria, they were in the way of everything coming in there, and they were afraid to tow them aside for fear they might not go ashore, and if they were outside floating around it would probably cause damage to ships coming up and going down the coast. That is the way I understood it.

(COURT:)

Q. Do you call Astoria Scow Bay?

A. There is a place there they call Scow Bay, but inside of the company's wharf.

Q. You have an entire side piece or part of the side piece?

A. Yes, sir.

Q. What side is that?

A. I am not sure, but I think it is the port side.
Q. How much have you got of that?
A. I have got the whole length of it.
Q. Just describe its character and condition to the court; that is, the way in which it is fastened together; what parts are there and its general character and condition.
A. In the first place the clamps and the springs that are below the clamps, the first and second clamps, are fastened with spikes, and also the sides of the sheer strake and the strake below all of the planking is fastened with spikes, and then after that there are bolts put there, screw-bolts two to each frame, generally speaking, and two spikes to each frame; that is the way they were generally fastened, and that is the way that was fastened; that would make two bolts and two spikes to each plank in each frame.
Q. Are the frames and the sides and the sheer strakes and clamp strakes still there intact?
A. Yes, sir.
424 Q. How are they; how do they lie there; just describe them?
A. They lie with the inside up; the inside is up and the plank is on the beach; sometimes it is afloat when the tide comes in.
Q. State whether they are not connected?
A. Certainly they are connected, the same as they were when they were built.
Q. Are there any broken timbers in there, broken frames?
A. In that section?
Q. Yes?
A. Only where she parted, where she broke up; at the bilge; there are no broken timbers above.
Q. How is she broken?
A. She was broken right in the turn of the bilge, right in the knuckle strake or the turn of the bilge.
Q. What part?
A. The top timbers, the lower end of the top timbers.
Q. Are they broken straight off?
A. Pretty much broken straight off; on the side they are broken off; they are broken not all along the same as the grain in the wood; in one piece of the timber it is not run the same as the other.
Q. Are they mashed or broken?
A. They are broken. They are split; they are not broken square off, they are split.
Q. Have you made any examination of this side as to strength of the wood and the character of the wood?
Q. Of the general character of the wood; of what is there, you mean?
425 Q. The general character of the wood?
A. Yes, sir.
Q. What examination did you make?
A. I find it is as good for any practical purpose.
Q. How did you make the examination?

A. By cutting some off and boring into it.
Q. For what purpose?
A. I was asked to do it. Not only that, I cut off a portion of the bottom. I cut about thirty or forty feet from the bottom through keelsons and everything to get it in between the trestle work, and I cut about thirty feet from side to side.
Q. What was the condition as you cut her through?
A. Perfectly sound. I did not see anything wrong.
Q. Have you got any part of the bottom over there?
A. Yes, sir.
Q. At your place?
A. Yes, sir, I have got all of it.
Q. What was its condition?
A. That was the condition that I found it in; that was the time that I cut it off.
Q. What was the condition of the frame that ran up from the bilge strake?
A. They are in pretty fair condition, I should judge; I should judge them to be.
Q. Were they rotten?
A. No, sir, I did not find any rotten to amount to anything at all.
Q. Have you got a portion of the stern there?
A. Yes, sir, all of it.
Q. What is its condition?
426 A. It is about the same as the rest; nothing very seriously wrong with the condition of the boat.
Q. Did you find anything wrong with the condition of the boat; that is, the timbers?
A. No, sir.
Q. Of course she is all smashed up now?
A. Of course it is all rotten now.
Q. Mr. Rutter, have you got any choppings?
A. Yes, sir.
Q. Will you kindly get those and bring them in here if you have got them here?
A. They are here somewhere; yes, sir.
Q. How long ago did you cut these timbers off?
A. Last evening; yesterday afternoon.
Q. Where has the boat been lying?
A. Right off Smith's point.
Q. In the water?
A. She is partly in the water at high water.
Q. Do you know where the boat was lying before she was taken around to your place?
A. Yes, sir.
Q. Where was that?
A. She was lying inside on the company's docks.
Q. On water or on land?
A. On water.
Q. Afloat?
A. Afloat.

Q. Was she subject to the action of the tide, the waves?
A. Yes, sir.
Q. Now, Mr. Rutter, referring to this piece, which we will mark number one, where does that come from?
A. That comes off one of the lower ends of the lap; that is one of the pieces of timber pretty well on the after part of the boat.
Q. That is a piece, you say, of one of the lap timbers?
427 Which end of the lap timbers, do you remember?
A. I think it is the lower end, the lower end of the timber.
Q. Did you saw that out yourself?
A. Yes, sir.
Q. How are these lap pieces fastened and how are they used?
A. They are used to connect the top timber from the floors together.
Q. Just describe the construction of the lower part of this barge, that is below the bilge strake.
A. The floors run out, they practically turn, as far as you can get it out of lumber without getting cross-grains in it, and then the top timber comes down and joins against it, and sometimes comes down against it, and sometimes runs down alongside of it, and then there is a lap piece that comes down and connects the piece together.
Q. Then this lap piece that you refer to is what fastens the upper part of the frame to the lower part of the floor frame?
A. Yes, sir.
Q. That is the side frame to the floor frame?
A. Yes, sir.
Q. And it laps right across the joint?
A. Yes, sir.
Q. Were these lap strakes broken?
A. I don't know; there were not many of them broken, they were just merely worked asunder.
Q. That is, those that parted from the knees?
A. Yes, sir; parted from over the lower part or top part.
Q. What pieces mainly were broken?
428 A. The knees were chiefly broken; they could not support them very well; some places they were broken.
Q. (Handing witness piece of wood marked No. 2.) What is that a piece of?
A. A piece of the floor.
Q. What do you mean by the floor?
A. It runs across from one side of the bottom to the other.
Q. Those are the beams?
A. The floor timbers down in the bottom part of the boat.
Q. (Handing witness piece of wood marked No. 3.) What is that a piece of?
A. That is a piece of one of those knees that we have spoken of, top or bottom, I can't tell which; that is where the split was; it broke off.
Q. It broke here (indicating)?
A. Yes, sir.
Q. (Referring to No. 3.) Whereabouts was that piece taken from?

A. From the bottom.

Q. Do you know whereabouts, with reference to the boat, running up and down?

A. I don't know; I went all over; I took a piece from one part and then from another right along the whole structure of the boat.

Q. Did you select these pieces?

A. No; not in particular.

Q. How do they compare with corresponding pieces?

A. About the same.

Q. (Handing witness piece of wood marked No. 4.) What is that?

429 A. The same, one of those knees.

Q. Is that where one of the splits occurred?

A. Yes, sir.

Q. (Handing witness piece of wood marked No. 5.) What is that a piece of?

A. A piece of the center; it is not the floor; it is what comes down to join in the floor; it is double down there; the floor comes right across, and it is what they call the first footer that comes down and meets on the center, right underneath the center keelson on the keel, and there is one on each side of that, a double frame.

Q. (Handing witness piece of wood marked No. 6.) What is that?

A. A piece of wood.

Q. Where was that taken from?

A. Just about the middle somewhere.

Q. Was that the top or bottom?

A. I could not tell you exactly. I guess that was about the same thing, it may have been from the bottom like that, coming up in that shape (indicating) and the other part is turned up this way.

Q. (Handing witness piece of wood marked No. 7.) Whereabouts is this piece from?

A. From about the bilge.

Q. Part of the side of the boat?

A. Yes, sir, between the side and the top.

Q. (Handing witness piece of wood marked No. 8.) What is this a piece of?

A. A piece of that, I think.

Q. Mr. Ritter, referring to those pieces of the knee and

430 matters of that kind, were these pieces that you have selected any better than the others, or how do they compare?

A. There was no choice that I am aware of.

Q. Have you got part of the deck there?

A. Yes, sir, I have got all of it there.

Q. What is the general appearance; what is its condition and general appearance?

A. She is in very good condition. I saw a little forward where she had been repaired by beams put in alongside, a few of them new ones.

Q. When you sawed this boat right across the keelson, what was the condition of the keelson?

A. It was in good condition.
Q. Where does a boat generally rot first?

Mr. Wood objects as incompetent.

A. Along the bilge.
Q. What was the condition of the tops of the frames, the side frames?
A. The side frames, all that I have seen are in very good condition.
Q. What is the condition of the two strakes there, the clamp strake and the sheer strake?
A. All good; everything was good there as far as I could see; there was nothing there to condemn that I know of.

Cross-examination.

Questions by Mr. Wood:

Q. Mr. Rutter, you seem to be the residuary legatee of the company in this boat. You have got all that is left of her, have you not?
A. I don't know; there is some in other places, a little of it.
431 Q. Well, you have said that you had all of the bottom?
A. I have.
Q. Is that strictly true: have you got every bit of it from the stern to the stem?
A. That is strictly true.
Q. You have got the entire turn of the bottom, have you?
A. Yes, sir; I don't know about the turn; the length and I believe the turn pretty well up to the turn of the bilge.
Q. I mean fore and aft.
A. Yes, sir.
Q. How much of it have you got running fore and aft?
A. I have got all of it.
Q. How much in length, how many feet?
A. The length of it I don't know; I never measured it.
Q. Make a guess of it.
A. I should judge about 175 feet.
Q. You have got 175 feet of bottom?
A. I have got all there is.
Q. Have you got the stem?
A. I have got the forefoot part of the stem.
Q. Have you got her stern piece?
A. She never had a stern piece. I have got the transom.
Q. Have you got the transom?
A. Yes, sir.
Q. Have you got the bottom timbers clear out to the transom where they join?
A. I have.
Q. Now all of these pieces that you have introduced in evidence are from below the water line of the barge, are they not?
A. They are right at the break where she parted.

432 Q. I don't know where that is; at least I am not supposed to know. Are they below the water line of the barge or not?

A. If you will describe where the water line is I will tell you.

Q. You are barge-builder, are you not?

A. Yes, sir.

Q. Did you ever see this barge?

A. Yes, sir.

Q. Did you know about what her draught was?

A. No, sir.

Q. Do you know about what the usual draught of barges of her build would be when loaded, about what would she draw?

A. I should judge she would draw from probably five to six feet; between five and six feet; maybe more and maybe less; I don't know.

Q. Everything that you have produced here has been below the bilge strake, has it not?

A. No, I think the plank was above the bilge strake and one or two of these pieces.

Q. How many above it?

A. The bilge strake extends probably about two feet.

Q. The bilge strake does not extend two or three feet, does it?

A. Two or three bilge strakes on one side.

Q. There is only one mark on that diagram that I remember.

A. That was inside, I suppose.

Q. With reference to that, where was this taken from?

A. These pieces?

Q. Yes.

433 A. They were taken below what we call the bilge strake.

Q. Then if this boat had four or five feet draught these pieces are all taken from below the water line, are they?

A. I don't know how much water she drew when she was light.

Q. How long ago did you make your examination? You said you cut these pieces out yesterday. How long before that did you make your examination of the wreck?

A. I have been examining her for the last month; I have been working on her.

Q. Have you worked for the company?

A. Not lately; no.

Q. How long since?

A. I worked for the company a little last winter.

Q. You say the company gave you these fragments?

A. It did.

Q. Have they any value?

A. For firewood.

Q. Could you not use any of the timbers in a construction?

A. I would rather take new timber.

Q. In your examination of the barge and this fragment that is down there did you see any rotten wood at all?

A. I saw a little in the ends of these old beams where they put in the new ones alongside of them in the deck.

Q. How far is your place from where the barge was originally wrecked?

A. About two miles.

434 Q. And how long has the barge been lying on your beach or premises?

A. The side piece only came there, I think, last Sunday.

Q. Was that the first piece that came?

A. No, sir; the bottom and top have been there about two or three weeks.

Q. Where were you at the time this accident took place?

A. I was at home.

Q. In Astoria?

A. Yes; I was at my home.

Q. How long after the accident took place was it until you saw this barge?

A. The accident took place in the night and I saw her about seven o'clock the next morning.

Q. Didn't you tell Captain Neal, of Astoria, that the barge was rotten?

A. I never heard of it before.

Q. You mean to say you did not?

A. I did not.

Q. Did you tell any one that?

A. Not that I am aware of.

Q. You would know whether you had or not?

A. If I did I did not do it that I know of.

Redirect examination.

Questions by Mr. COTTON:

Q. Did you have any conversation with Captain Neal about that at all?

A. Captain Neal came and asked me to go on the examination, I believe for some person, and I went and told them that I

435 did not know anything about it; I did not want to have anything to do with it; I believe those are the words I told them, as near as I remember.

Q. Whereabouts did you say, with reference to the break, where that occurred, did you take these pieces?

A. I took the pieces right around the break, as near as I could where the damage was done.

Q. Referring to above the water line, where are the pieces above the water line and what is their condition?

A. The pieces above the water line, all that I have seen, are perfectly sound.

Q. Where are they?

A. The water line of the barge is where she will float when she is light.

Q. Yes, but where are all the pieces above the break?

A. On the beach, one side of her.

Q. That is, her entire side?

A. Yes, sir.
Q. What is its condition?
A. It is good.
Q. How is its condition with respect to fastening together?
A. It is just as good, as far as I can see, as when she was put there.
Q. State whether or not it is still fastened and bolted together?
A. Yes, sir; it is still fastened and bolted together.
Q. Is it broken up?
A. No, sir.
Q. Are there any breaks, or anything pulled apart, or anything else of that kind in the side?
A. No, sir; not in the side, only where it is broken right off in the bilge.

436 Questions by Mr. WOOD:

Q. You say that you have got the entire side. Do you mean that you have got every particle of that from stem to stern?
A. Yes, sir; it is all there.
Q. The entire length of the boat?
A. The entire length of the boat.
Q. Which side of her have you got?
A. I have got the port side.
Q. What became of the starboard side?
A. The starboard side has been cut off for wood.

Questions by Mr. COTTON (resumed):

Q. Is this barge where she can be inspected by anybody?
A. Before the accident?
Q. Now. Are these pieces where they can be looked at by anybody?
A. Yes, sir.
Q. When did Captain Neal speak to you about this matter, since you had the barge?
A. No, before.
Q. Was she lying around there? Where was she lying at that time?
A. She was lying at the company's dock then.
Q. Right out in the city of Astoria?
A. Yes, sir.
Q. In plain sight?
A. Yes, sir.

Questions by Mr. LORD:

Q. How long ago was the port side of the barge cut up for firewood?
A. The port side is there now; the starboard side has been cut up.
Q. How long ago was the starboard side cut up?
A. I could not tell exactly; I did not see it.
Q. Did you cut it up yourself?
A. No, sir.
Q. Did you see any of it?

A. Yes, sir.

437 Q. Did you make any examination?

A. No more than cut into it; I examined the plank that was afloat and I could not examine the bottom.

Q. You don't know whether that was in a rotten condition or not?

A. No, all that I examined of that was the planking part of it.

Q. If I understand then, the starboard side of the boat that was lying down the beach; that has been cut up for firewood, is that part of the guard that was taken out of the water when the barge was afloat?

A. Yes, sir; that was the starboard side.

Q. And about the condition of that you are not acquainted?

A. No, sir; only the planking of it; I am with the side planking.

Q. The deck planking?

A. No, sir; the side planking.

Q. You saw the inside or outside of it?

A. The outside.

Q. Was there any rotten wood you saw from the outside as well as from the inside?

A. I cut that piece in it.

Q. You cut that piece in it?

A. Yes, sir; I saw it where it was cut in two.

Q. That was the starboard side?

A. Yes, sir; I cut in two places.

Q. You heard the testimony of Mr. Blagen here a few moments ago, did you, the gentleman that testified just before you?

A. Yes, I guess I did.

Q. You heard him testify that the ends of the knees were in some places rotten, didn't you?

438 Mr. COTTON: I object to that question on the ground that Mr. Blagen never testified anything of the kind.

Q. You heard him testify about the condition of the knees, that there were some parts of them rotten?

A. I heard him testify that some parts of them were discolored.

Q. Didn't you hear him testify that some parts were rotten?

A. No, I did not. Some might call it rot, but it is discolored all the same by water and iron.

Q. If Mr. Blagen testified some parts of the knees were rotten, state whether or not that would be true?

The COURT: I don't think that is a proper question to put to a witness.

Question withdrawn.

Q. How does it happen, Mr. Rutter, that the pieces which you have brought here are all sound, no rot on them at all?

A. I suppose it is because they were not rotten; that is all I know.

Q. You did not see any rotten pieces in connection with the barge at all?

A. Certainly there is a little rotten around the beams, and some discolored and worn from the action of the water; some might call it rot.

Q. You did not bring any of those pieces here in court?

A. They are just the same as that.

Q. You don't call those rotten pieces?

A. No, I don't call those rotten pieces; I don't call those that I described rotten pieces, only discolored by the water, and the
439 planking is worn off some by the action of the water, the friction of the water on it; at the same time, they are not rotten.

Q. You did not see any rotten pieces about the boat?

A. Not about the boat, no, I did not.

Q. Nor about any of the pieces that were there?

A. About the beams I did, a little about the beams; where there were new ones in alongside of them, the beam ends.

Q. You did not select a piece of that to bring here in court to show its condition?

A. No, I was not asked; I was not asked to go and take the other out; I was asked to go and take out some pieces where I thought proper.

(Redirect:)

Q. Did you exercise any particular care about selecting them?

A. No.

(The COURT:)

Q. I understand you to say that you selected this timber along the line of the breakage?

A. Yes, sir.

Excused.

J. C. FLANDERS recalled on behalf of petitioners.

Questions by Mr. COTTON:

Q. When were you in Astoria last?

A. Last Tuesday.

Q. Last week?

A. Yes, sir.

Q. Do you know where the "Columbia" was then?

A. No, sir.

Q. Did Captain Gray tell you where she was?

A. Now that you ask me, I think Captain Gray told me that he had seen the barge, but I don't remember that he told me
440 where she was; I got into Astoria I think about five o'clock, and my boat was to leave at seven, and I met Captain Gray at the hotel just as I was going in to dinner, and I asked him if he was coming up to Portland to testify, and he said that Mr. Cotton had asked him to look at the barge and wanted him to come as a witness; I don't think that he told me where the boat was, in fact, I don't remember that he did.

Excused.

H. OLSON, a witness called on behalf of the petitioners, being first duly sworn, testified as follows:

Direct examination.

Questions by Mr. COTTON:

Q. Where do you live, Mr. Olson?
A. Astoria.
Q. Have you got any parts of the barge "Columbia"?
A. Yes, sir.
Q. What have you got?
A. A piece off of one side.
Q. What did you get it for?
A. To break it up for firewood.
Q. Haven't you cut most of it up?
A. Yes.
Q. How long ago did you commence cutting it up?
A. About a month and a half, I guess.
Q. This is the starboard side, is it not?
A. Yes, sir.
Q. About how much of that side did you have?
A. Eight planks and the top plank.
Q. Did you have any of the frame?
A. Yes, there was some frame, the top plank; there is a broad top that comes on, fifteen-inch plank.
Q. You had eight planks along the side?
A. Yes.
441 Q. Were the timbers fastened to the plank?
A. Yes.
Q. Did you chop the planks and the timbers up?
A. Yes.
Q. Are they down in your woodpile now, some of them?
A. Yes.
Q. Have you got some pieces here?
A. Yes, I have got a few pieces here.
Q. What is the character and condition of this wood that you chopped up?
A. It was good, all good and sound.
Q. How much have you chopped up?
A. I chopped up the whole thing.
Q. Where did you get it from?
A. Around the dock; it was floating around there.
Q. Did you chop any pieces off the port side?
A. I took some pieces of the timber around Smith's point.
Q. Have you got those with you?
A. Yes.
Q. Where are they?
A. They are here.
Q. (Indicating bunch of wood.) Where did you get these pieces from?
A. I got those off the timbers at Smith's point.

Q. What part of the timbers?

A. About the middle; I chopped out a piece off of each timber, about nineteen timbers.

Q. Where were these timbers situated with reference to the break?

A. It was broken below there.

Q. Was this chopped out of the side?

A. Yes, out of the middle of the side.

Q. How was that side when you saw it; was it lying together or separated in pieces?

442 A. All together.

Q. And these were chopped out of the middle of the port side?

A. Yes, sir.

Q. At Smith's point?

A. Yes.

Q. The piece that Mr. Rutter has?

A. Yes.

Q. Was this taken out above the bilge strake; do you know what I mean by the bilge strake?

A. Yes, above there.

Q. Above the bilge strake?

A. Yes.

Q. What timbers were these?

A. That is the side timbers.

Q. You mean the knees?

A. Yes.

Q. Part of the knees?

A. Yes.

Q. How many of them did you chop?

A. Nineteen.

Q. And these are the pieces out of them?

A. Yes, sir.

Q. What was the condition of the bottom of these pieces?

A. It was sound and good.

Q. Where did the break occur with reference to the bottom of these pieces?

A. Where it broke?

Q. Yes, where did these timbers break with reference to these timbers, above or below?

A. Below.

Mr. COTTON: I offer these in evidence.

Q. Were these parts of the broken pieces?

A. It was not so far down as where they were broken.

Q. Where broken, below?

A. Yes.

Q. But these are parts of the timbers that were broken?

A. Yes.

Q. How do these pieces compare with those that you chopped up on the other side?

443 A. About the same.

The COURT: Do you want to put that entire package in?

Mr. COTTON: I would like to put in the entire bundle; there were nineteen broken, and those are the nineteen pieces broken.

The same is marked No. nine, Oleson.

Cross-examination.

Questions by Mr. WOOD:

Q. How long ago did you get the side that you cut up for firewood?

A. A month and a half or two months ago.

Q. Where did you take it to?

A. I took it down to Astoria, where I live on the beach.

Q. How far is that from where she sunk?

A. Just about half a mile, I guess.

Q. And you put it on the beach?

A. Yes, sir.

Q. How much of the side did you cut out?

A. Sixty-three feet long.

Q. And was it just the middle of the boat?

A. No, from the stern.

Q. From the stern forward?

A. Forward.

Q. About sixty-three feet?

A. Yes.

Q. Did you cut any part of the stern of the boat?

A. No, I did not.

Q. Who cut up the wood that was cut up for firewood?

A. I did.

Q. You cut it up yourself?

A. Yes, I cut it up myself.

Q. How long ago did you do that?

444 A. At the time I took it.

Q. And none of this bundle that you have brought here is any part of it?

A. Yes, a few pieces of that timber, too, and I wrapped them up, too.

Q. And from what part of the boat were they taken in reference to the bilge, above the bilge or below it?

A. The middle.

Q. Right at the bilge?

A. Yes.

Redirect examination:

Q. Where did the piece at the outside that you got commence at?

A. I think about ten or twelve feet from the stern; of course there was a plank sticking out about ten feet.

Excused.

G. W. LOUNSBERRY recalled.

Questions by Mr. COTTON:

Q. Mr. Lounsberry, do you know the wreck of the barge "Columbia" when you see it?
A. I do.
Q. Did you go down with Mr. Blagen who testified a few minutes ago?
A. I did.
Q. Did you go down to that wreck?
A. I did.
Q. Was the wreck which Mr. Blagen examined the wreck of the barge "Columbia"?
A. Yes, sir.

Mr. COTTON: Is there any special dispute about that?
Mr. WOOD: No.

Excused.

445 J. S. DELLINGER, a witness called on behalf of petitioner, being duly sworn, testified as follows:

Direct examination.

Questions by Mr. COTTON:

Q. Where do you live, Mr. Dellinger?
A. Astoria.
Q. What is your occupation?
A. I am a publisher and printer.
Q. How many times have you seen the wrecked barge "Columbia"?
A. I can't say how many times I have seen it. I have seen it for the last year every few days.
Q. Where has it been?
A. Part of the time it has been alongside of the dock and from there it was taken to Scow bay and from there it was towed around to Smith's point.
Q. How long has it been drifting and lying around on the beach in the vicinity of Astoria?
A. I think about six weeks. It lay alongside of the dock before it was taken to Scow bay and drifted along Scow bay all winter.
Q. How close is Scow bay to Astoria?
A. Just above the Union Pacific Railway dock, probably about two docks.
Q. Right at the turn of the horse-car track, isn't it?
A. Yes, right at the turn. Any one going along the street railway track could see the wreck.
Q. Did you see the wreck down at Smith's bay?
A. Yes, I was down there when Mr. Blagen was there.
446 Q. What did you do and what examination did Mr. Blagen make and what did you see?

A. He took an ax and first went over the side that was laid up on the beach and cut into her, and afterwards he went onto the bottom of her and cut into the pieces along there wherever he could get at it, and then he went from there over to the trestle and from the trestle down to the deck part of it.

Q. Did you see him chopping?

A. Yes, I saw him chopping.

Q. What kind of timbers did he chop into?

A. I could not tell what they were, but they were the knees that came down and joined the boat together.

Q. Whereabouts, with reference to the break, were these, the pieces that were broken?

A. Yes, those were the pieces that were broken.

Q. Describe the condition of these timbers that he chopped into.

A. They were in very good condition. I would call them in a very sound condition. Of course he would come along where there was a little rot in it and I think there were probably two or three that were rotten in a little ways, but after he chopped in through that he struck sound timber.

Q. Did you see him chop the sides too, the side frames?

A. Yes, I was along with him.

Q. What was the condition of the side that he chopped; how was it lying; what was it?

447 A. I guess the port side was there lying up alongside of the beach, and he chopped into the place where he went down, where it joined onto the boat, and then at the top where the deck came out, and the top and bottom were both in sound condition.

Q. He chopped at both ends of these frames, did he?

A. Yes, sir.

Q. What I am after is, what was the appearance of this side as to its size?

A. I would take it to be the full side of the boat; the bottom lay there, and the side lay along there side of it, and the bottom and side were about the same length; if anything, I think the side was a little the longest.

Q. How was this side, was it scattered all over the beach?

A. No, it laid in one piece, one big solid piece.

Q. Bolted together?

A. Bolted together.

Q. Fastened or not?

A. It was all spiked together.

Q. Now, referring to this bottom piece, and this side piece, what was their appearance; how was the bottom piece?

A. The bottom piece was all in one piece, as it lay there; of course, at high tide it floated, at the time we were down there though it was very near low tide.

Q. What was the appearance of the partings between the bottom piece and the side piece?

A. It had kind of split off; there was only one piece that I noticed that was broken square off, and when he came to that I had

an idea that that was rotten, but after he chopped into it was sound, but it was broken square off.

Q. Why did you think that piece was rotten?

448 A. Because it was broken square off, and I had an idea that a rotten piece of wood would break square off.

Q. Do you know how many of those pieces were broken; did you count them?

A. No, I don't know how many.

Q. Who else was present beside yourself and Mr. Blagden?

A. Mr. Lounsberry, Mr. Olson and Mr. Long.

Q. What other chopping did you see done; what other examination did you see made or did you make? Did you look at these timbers after he chopped them?

A. I looked at them while he was chopping them; I saw several pieces that were sawed off—they might have been those pieces that were introduced in court; I saw quite a number, probably five or six, that were sawed off.

Q. Did you make any examination of these frames at the point where they were broken?

A. Yes, I did.

Q. What was the character of the wood there?

A. It was sound.

Q. Like these pieces that were chopped off by Mr. Olson?

A. Yes, just like those; a good many of them were more splintery than these pieces are.

Q. That is, right at the breaking point?

A. Yes.

Q. What is the condition of the tops of those frames right where they come underneath the deck and to which the deck is fastened?

A. They are sound; you can tell they are pretty nearly all sound without even chopping into them, because where those cross-

449 pieces were spiked on they broke square off, and part of the spike is in there yet; if they had been rotten the spikes, I suppose, would have pulled out; instead of that they are broken square off in there.

Q. How large are those spikes?

A. I don't know; I could not tell just how thick; they were quite large spikes.

Q. I am referring now to the clamp strake. When that side was lying there, you remember the piece that was bolted on the side?

A. The piece that ran the length of the boat?

Q. Yes.

A. Yes.

Q. How was that, all bolted on or not?

A. Yes, it was bolted on.

Q. Where did you walk when you got to this place, in walking along the side, where do you walk? What is the most natural thing to walk on? You remember those pieces that are clamped, the clamp strakes and the sheer strakes; what was the condition of those top frames underneath the deck?

A. They were sound there where the deck beams come there; the spikes were broken off in them.

Q. How were the spikes standing; were they left in there?

A. No, they were broken off.

Q. How thick were they?

A. I could not tell how thick they were through.

Q. Were they not standing up there?

A. No, the spikes were broken off; some of the bolts were broken off, and there is a bolt that goes down through that into the old wood; some were standing there and some were broken off.

450 Q. How large were those bolts that were broken square off?

A. I think three-quarters of an inch.

Q. Those came down and went into what?

A. Went into—I suppose this piece here (indicating on diagram).

Q. That is a sheer strake, is it not?

A. I can't tell very well.

Q. Did you see any part of the stern?

A. Yes, I saw the part of the stern that had been sawed off and was lying there on the beach.

Q. What was the appearance of that?

A. It seemed sound.

Q. Was it examined?

A. Yes, we chopped into it.

Q. How did it look?

A. It looked sound; it looked a little black; I would call it sound timber.

Cross-examination.

Questions by Mr. WOOD:

Q. How were these bolts and spikes affected by the weather were they rusted and eaten away, corroded at all?

A. No, they did not seem to be eaten away.

Q. Did you examine particularly to ascertain?

A. Yes.

Q. How were the holes in which they were, were they corroded or rotten or stained any?

A. Where they were broken off, there was a spike in there; there was no——

451 Q. (Interrupting.) Around that spike was the wood corroded or rotten or stained?

A. There was rot around the spike.

Q. Was there rot for any distance around the spike?

A. I could not say as to that; I don't believe that I noticed it particularly, whether it was or not, but as long as the spike was broken right off in there I suppose it would not be.

Q. That would be your supposition. Now what you saw of the spike was what was in the wood, was it?

A. Yes.

Q. And you did not see any of them sticking out?

A. Occasionally I would see one sticking out, probably—I don't know that I saw any spikes, I saw some bolts.

Q. Were they perfectly sound and not corroded at all?

A. Yes, I would call them sound bolts.

(Redirect:)

Q. Those spikes that you refer to were right underneath the deck?

A. Yes.

Excused.

H. ANDERSON, a witness called on behalf of petitioners, being duly sworn, testified as follows:

Direct examination.

Questions by Mr. COTTON:

Q. Mr. Anderson, where do you live?

A. Portland.

Q. How long have you lived there?

A. About fourteen years.

Q. What has been your business?

452 A. Boat builder and contractor.

Q. Have you got a ship yard here?

A. Yes, sir.

Q. In the city of Portland?

A. Yes, sir.

Q. Where have you worked at various times?

A. The first time I came here I worked where I could get a job, and the last six years I have worked for myself.

Q. Did you examine part of the wreck of the barge "Columbia," or what was called the barge "Columbia"?

A. Yes, sir.

Q. Where was she?

A. In Astoria. The first time I was down she was lying at the company's wharf, on the side.

Q. Where afterwards did you see her?

A. At Smith's point.

Q. When she was lying down at the company's wharf, did you examine her?

A. I could not examine her very well; she was in the water.

Q. You went down with Captain Bosworth and Mr. Stefen, didn't you?

A. Yes, sir.

Q. How soon was this after the accident?

A. I do not remember; I could not tell how soon after the accident.

Q. You went down to look her over, didn't you?

A. Yes, sir, I went down to look her over.

Q. And you could not tell much about her?

A. No, sir, I could not tell much about her, except the hog chains that were on her; that was all we could tell.

453 Q. When did you see her afterwards?

A. Last Sunday.

Q. Where was she then?

A. Down to Smith's point.

Q. Lying in what kind of water?

A. Mostly dry.

Q. Where you could walk around her and look at her?

A. Yes, on one side, and the other side on the top of the frame.

Q. This was down where Ratter lived, at Smith's point?

A. Yes, sir.

Q. How much of the side was down there that you saw?

A. The port side is there, and part of the starboard side.

Q. What part of the port side is there, all of it?

A. The whole side is there.

Q. Did you go over it and examine it?

A. Yes, sir.

Q. In the first place, without reference to the wood, describe what side lies there, what it consists of, how it is connected, and so on?

A. The top frame is a natural crook which goes down to the bilge; they are parted from the lower pieces, the spikes are broken from the lower pieces; there are about twenty frames broken forward; it was rotten about twenty feet from the stem, partly with the hog chains connected too, but there is a new piece put alongside of it and spiked from the outside.

Q. How much of this side was there?

454 A. The whole side is lying there; there is a little piece from the stem; where the stem is connected to is apart from it, but the whole side is lying there.

Q. What are the pieces, the plank pieces, that run along the top?

A. Clamps, two pieces of the clamp strake.

Q. What are they used for?

A. For holding the top frame together, the deck beams.

Q. That is what you put the deck beams on and they are fastened to the frames for the purposes of holding up the deck beams?

A. Yes, they are bolted together through the frame.

Q. Were these frames di-connected or were they still connected by means of these strakes?

A. They were all connected.

Q. Were those strakes bolted or spiked together, or how were they fastened?

A. They were all spiked and bolted together; that is the way they were put there.

Q. What kind of bolts?

A. Three-quarters, I think they are, or five-eighths, I will not be sure, screw-bolts.

Q. What do you mean by screw-bolts?

A. They are to secure well the sheer strake and the clamp, because there is a heavy weight, of course, on top, and then there is a frame that makes it secure; the whole weight is on the sheer strake alone.

Q. Were those pieces broken up?

A. No, sir.

Q. How were they?

A. Very good.

Q. Were they still connected?

A. Yes, sir, still connected.

455 Q. Fastened to the frame?

A. Yes, sir.

Q. What was the condition of the frames of that whole side from the bilge strake up? What was the bilge strake fastened to?

A. To the floors and the lap piece.

Q. Where was the bilge strake; was the bilge strake with the side or the bottom?

A. The bilge strake was with the top frame.

Q. That is, with the side?

A. Yes.

Q. Is that bilge strake still fastened on?

A. Yes, there are two bolts in each frame.

Q. Fastened tight yet?

A. Yes, sir.

Q. Where did the break occur?

A. In the knuckle, where the two bolts come together from the frame and floor.

Q. Were these pieces broken or pulled apart?

A. I saw twenty broken and the other one is pulled apart; the spikes are broken off.

Q. How were those twenty that were broken with reference to each other; were they scattered throughout the boat or were they more or less broken together?

A. There were fifteen broken in one place; I think I counted fifteen, and a couple here and there.

Q. That is, fourteen or fifteen were all together, were they?

A. Yes, I think fourteen or fifteen; I would not be sure.

Q. Where were they located with reference to the length of the barge?

A. Somewhere about amidships.

Q. How were they broken?

456 A. They were broken right square off; I mean up and down the way the frame is. (The witness illustrates on map.) Like that.

Q. Broken with the split?

A. Yes.

Q. Did you examine the condition of its side?

A. Yes, sir.

Q. What parts did you examine and how did you examine it and what was its condition?

A. I examined the whole, everything that was down there, the

whole side, top frame and everything that was lying there on the beach.

Q. What was the condition of the wood?

A. I found it in a very good condition; better than I expected. I thought the top frame would be rotten, but it was just as sound as the day it was put in.

Q. That is, you mean the top of it. Why did you expect the top frame to be rotten?

A. Because more or less water goes through that cannot be prevented all the time; it seeps through.

Q. What was the condition of those?

A. Very good; the top was very good; so was the lower part of the frame. There are three or four lap pieces that I found were rotten; not to amount to anything; what I consider amounts to anything. I would find that in a boat a year old.

Q. Where were these lap pieces with reference to the break?

A. That is where she was broken; it was amidships. The lap pieces ran with the floors, connected. In amidships there is another lap piece.

Q. Are those the particular lap pieces that you are referring to that were rotten?

457 A. No, amidships.

Q. Were they broken?

A. No, they were not broken.

Q. The pieces you refer to as being rotten, were they broken or not?

A. No, they were not broken.

Q. Where had the break taken place with reference to these pieces that were rotten; was it above them or below them?

A. Above them.

Q. And what piece was broken there?

A. The frame was broken.

Q. What was the condition of those frames that were broken above these rotten pieces?

A. Very good.

Q. What do you mean by those pieces being rotten; just tell the court what you mean by that?

A. They were not so sound. I found only three or four in the two days that I was down there and examined it, and they were not as good as the frame, but still they do not amount to anything. I found three or four pieces that were rotten.

(COURT:)

Q. You mean that the rot did not amount to much?

A. No, sir; it did not amount to much.

(COURT:)

Q. You find that in a boat a year old sometimes?

A. Yes, sir, in a boat a year old that required $1,700 *dollars* worth of repairing.

Q. Do these rotten pieces have any connection with the break? I believe you stated the break was not at these rotten pieces?

A. No, the break was in the frame.

458 Q. The rotten pieces were the lap pieces?

A. Yes, sir.

Q. And they were not broken?

A. No, sir.

Q. How much of this barge did you examine, did you go all over it?

A. I went over the bottoms on both sides; what was lying there on the bottom; the whole port side and a part of the starboard side was lying there.

Q. How did you find the bottom?

A. I found the bottom good.

Q. Just describe to the court what the general appearance is of the bottom so far as the way in which she lies there is concerned?

A. The bottom is good on her; the bottom of any boat is generally good, because it is always under water; up on top of the frame is where you expect to find it worst; on the stern and on the top of the frame (indicating on diagram). This is the frame in here and this is the deck beam, and this part should be rotten and that should be rotten.

(COURT:)

Q. The part immediately under the deck ought to be rotten first?

A. Yes, sir; that is the part that ought to be rotten first, and that underneath the stern ought to be rotten. Those beams that project over the side, the deck beams, I found a piece new alongside of every one; I found new timber alongside of every one; spiked on and bolted in the clamp and sheer strakes.

Q. What part of the bottom is there now?

A. All of the bottom is there; there might be a piece off of it.

459 Q. Are the pieces of the broken frames from the port side still on the bottom?

A. Yes, sir; they are still there.

Q. The corresponding broken parts?

A. Yes, sir.

Q. Are they fastened to this bottom now?

A. Yes, sir; they are fastened to the deck, the floor there.

Q. They are still fastened to the floor; what about the starboard side?

A. It is the same; it is fastened there.

Q. And the bottom parts of the starboard frames are still there?

A. The frames?

Q. Yes, the bottom part of the starboard?

A. Yes, the bottom part is there.

Q. The bottom parts of the frames on both sides are there, are they not?

A. Yes.

Q. What is the condition of those?

A. I went around and I did not find a rotten one in it, not a rotten frame.

Q. How long did you stay down there making this examination?

A. Two days.

Q. You were down there at different times two days, were you?

A. Two days and two nights, yes.

(COURT:)

Q. Do I understand you to say you were down there at different times?

A. I have been down there twice.

Q. This last time you were down there a couple of days?

A. Yes, sir.

Q. That was a week or two ago?

A. Yes, sir.

460 Q. Now, what was the condition of all of the frames that you found in the bottom of the boat there, that were still fastened to the bottom?

A. I found them very good, and I took my knife out and examined every one of them.

Q. Were the frames from both sides there?

A. From both sides; the stumps, or pieces.

Q. How were they; were they lying there loose on the wreck or were they fastened to the boat?

A. Fastened to the bottom entirely.

Q. That is, the floor pieces. Are those fastenings broken down there or are they intact yet?

A. Oh, yes, spiked to the floors.

Q. Suppose you were to go out and get that side, would it match right on to the bottom so as to make the barge or not?

A. It would after considerable trouble, as much as you could expect.

Q. That is, it would fit right on and make the rest of the barge?

A. Yes, you could fit it on with considerable trouble.

Q. Did you see any part of her stern?

A. Yes, I saw a part of her stern.

Q. Did you examine it?

A. Yes, sir.

Q. What was its condition?

A. In pretty good condition.

Q. Did you see the deck, or did you go out on the deck?

A. Yes, sir; I was out on the deck.

Q. How did that appear?

A. The after part was sawed off; the part that was sawed off was very good and amidships, too, it was the same way; I found it very good.

461 Q. Where is the deck lying now?

A. It is lying outside of the trestle.

Q. In deep water?

A. Yes, deep water, I think.

Q. How did you get out to it; how did you examine it?

A. I went out there with a boat.
Q. Did you get on it?
A. Yes.
Q. Could you walk on top of it?
A. Yes, sir.
Q. Where are the keelsons?
A. Inside of the boat, and some of them, the bilge pieces, are setting on the frame, the keelsons are in here (indicating on diagram) part of the keelsons are in here.
Q. What appearance of break did you see the first time you were down there, how was the boat broken when you went down and examined it the first time?
A. She was bulged out in the middle lying over on one side; the port side was lying under the water, we could not see anything of her; the starboard side was partly out of water; I saw a piece of the stem was broken away. You could not see much of her; I could not see inside of her what was broken and what was not broken.
Q. Do you know anything about the strength of timbers of boats sustaining power?
A. I know a little about it, yes.
Q. What experience have you had in that line, building boats?
A. Yes, sir.

The COURT: He has stated that already that he has been a builder of boats for six years on his own account and working for others.

Q. Would that boat sustain a cargo of 588 tons?
A. I should judge she ought to.
462 Q. Why?
A. She was strong enough; she had heavy frames, heavy keelsons, good deck on her, good fastenings on her, and deck beams; the deck beams ought to have held the frames together, because there were good fastenings in them; I found two bolts in every beam, one on the clamp and one on the sheer strake.
Q. What is the effect of salting?
A. It preserves wood as well as meat.
Q. What are these knees made out of?
A. They are made out of fir and fir crooks from the trees.
Q. Were those natural crooks?
A. Yes, sir; they were natural crooks. They were even twenty feet; the crooks were straight timber; it stands straight up.
Q. What was the size of these?
A. Four by nine, moulded when they were put together, and another——
Q. (Interrupting.) Four by nine in there?
A. Yes, sir; it might have been a little more and the other a little less.
Q. What was the size at the other end?
A. Four by four.
Q. They taper off, do they?
A. Yes, sir.

Q. How do these frames in the "Columbia" compare in size with the frames used generally in barges along the Columbia river?

A. They are better than the frames in most barges; there are few barges that have such crooks.

The COURT: There is no question here as to the strength of the boat when it was built, I suppose?

463 Mr. COTTON: It is simply alleged that she was unseaworthy. I do not know what they refer to by that.

The COURT: In that view of the case you may proceed:

Q. How does the "Columbia" compare in size with the boats and frames generally?

A. First rate. You can go on any boat of that size and of that shape——

Q. (Interrupting.) It was built for what?

A. After she was built——

Q. (Interrupting.) Are these frames larger or smaller than the general run of frames in barges and boats generally?

A. In a flat-bottomed barge with a frame 4 by 10 and the sides 4 by 8 and 4 by 10, or something like that, there is not nearly the work done on the inside that there was done on this barge.

Q. Would you as a ship carpenter consider that this barge was a seaworthy barge for use on the Columbia river between Portland and Astoria?

A. Yes, I would.

Q. And you would consider her seaworthy compared with the general run of barges used in this port?

A. Yes, sir.

Q. And for the purposes of this port?

A. Yes, sir.

Q. Have you been at sea?

A. Yes, sir, I have.

Q. For how long?

A. Ten or twelve years.

Q. State how the "Columbia" compared generally with barges that you have built at your yards in respect of seaworthiness?

A. I could not change much on her; I could not do anything that would strengthen her.

464 Cross-examination.

Questions by Mr. WOOD:

Q. In your opinion, to have a barge seaworthy ought she not to be built to hold her load when she is aground or beached?

A. It depends a good deal on the bottom of the ground, the bottom of a river; if there is a soft bottom, yes, and if a rock or hard bottom, no; and if it is a new barge, no.

Q. Do you mean the rock bottom or hard bottom would knock a hole in her?

A. If one place is high and the other is low, as soon as she settles down she will naturally split.

Q. But if it has a soft bottom she ought to hold together?

A. I think she ought to; that is my judgment.

Q. Barges are built with the idea that at some time they will have to lie aground and not be floated, are they not?

A. No, they do not often get aground.

Q. Do you build your barges with the idea that when they touch the ground if they have got a load on them they go to pieces?

A. No, I try to get them so that they will stand up, but you cannot build a barge so she will lay on any ground, because she will not do it.

Q. If the barge is properly constructed ought it to make any difference to her in the water whether or not she has a list when afloat?

A. Do you mean would that hurt her when she got the list?

465 Q. Yes; as to her strength?

A. A list does more or less harm, but at the same time I have been aboard a ship with her main hatch in the water.

Q. A barge is not built with the idea that she will always carry her load on an even keel, is she?

A. A cargo comes in and we can see it mostly every day here.

Q. Now if a cargo is shifted so as to give her a list and she gets into a soft mud bottom, ought she not be strong enough to hold up the load she is carrying?

A. I would think so. You might take a new barge and she would not hold up.

Q. If a new barge would not hold up a load that she was built to carry when she was lying in soft mud you would say that she was a bad barge, wouldn't you; that something was the matter with her?

A. No.

Q. How many of these natural crooked knees were broken off in the barge "Columbia"?

A. On the port side I think there were about twenty; about fifteen or twenty in one place, I think.

Q. They were all natural crooks, were they?

A. All natural crooks; yes, sir.

Q. And all the breaks that you examined were in the natural crooks?

A. All of the natural crooks that I examined; I examined nearly the whole deck; all the breaks are in the natural crooks.

Q. And you examined the whole boat?

A. All that was left of her; yes.

466 Q. Do you mean to say that every timber of her stem was there when you examined her at Smith's point?

A. From the port side of her; yes.

Q. Every timber?

A. Yes, sir.

Q. Clear to the stem?

A. Yes, sir.

Q. Where was the stem?

A. Lying close alongside of it.

Q. The stem was lying close alongside of it?
A. Yes, sir.
Q. And how about the port side?
A. This is the port side (indicating on diagram).
Q. The starboard side?
A. The starboard side; it was all there, the end from the lower part of the top frame was there, and there is a little piece, I should judge about 30 feet, that belongs, I think, aft.
Q. Then every timber for this barge that was necessary to make her complete frame new, was there, was it? No timber was missing from her frame?
A. From her port side?
Q. From the whole barge.
A. Most of the starboard side, the lower part of the frame, was there.
Q. What is missing then?
A. The top part of the frame on the starboard side is there, the greater portion of it.
Q. Are you at work for the Union Pacific Co.?
A. No; I have not worked for them for a long time.
Q. When did you say that you first saw the frame at Smith's point; how long ago?
467 A. Last Sunday I saw the bottom and part of the stern there; the whole deck and the whole port side I saw on Monday; the whole port side I saw Monday; the balance I saw Sunday.

Redirect examination:

Q. What do you mean when you say that you saw the bottom part of the frame and the starboard side?
A. I saw the lower part of the frame where it was broken.
Q. Those bottom parts of the frames and the starboard side are fastened to what?
A. They are fastened to the lap pieces, to the bottom planking.
Q. To the bottom?
A. What is left of it.
Q. Those which you examined were in the bottom?
A. Yes, sir.
Q. Then you examined the frames on both sides, both the starboard and port sides?
A. Yes, sir; what was left; I examined the starboard frame, and the port frame was all there, and what was left of the starboard.
Q. That is, below the break?
A. Yes, sir.
Q. Should a seaworthy barge sustain her load in soft mud, the tide receding, leaning over at a very decided list?
A. She should not by rights, but she might; it is hard to tell what is in the middle; the bottom may not be level, and then she would break.
Q. Suppose the hog chains broke?

A. She would straighten out if the hog chains broke.

468 Q. If the weight of the cargo on her deck should force the hog chains out and break her, what would be the effect?

A. She would break up.

Q. Suppose she came over and struck on her bilge with more or less force, would that subject her to a great strain or not?

A. She would break.

(Recross:)

Q. Suppose that she was badly injured in the stem, would that have a tendency to weaken her for such a strain?

A. No, I don't think it would.

Q. (Interrupting.) Why not, why wouldn't it weaken her?

A. Of course when the water is in her, if she is aground full of water then of course she will; she is bound to upset. If she had been out in deep water she could have thrown her cargo out and she would have been on top of the water.

Q. That would be on account of the water in the hold?

A. Yes, sir.

Q. Why would not a break in the stem affect her sustaining power back here in this portion of the barge?

A. If she knocks the stem out of course she is bound to fill with water and she is bound to sink; it weakens her more or less.

Q. But what sustains the deck?

A. The whole boat, the frame.

Q. The frame?

A. The frame and everything; the keelsons.

469 Q. What connection has a break in the lower part of the stem with her frames along the side amidships?

A. The forefoot has got nothing to do with amidships, but it is fastened to her keelson.

Q. And the keelson is what kind of a deck timber?

A. The keelson, I think, is six inches thick.

Q. And what effect would a break down in the forefoot have upon the sustaining power of the frame amidships of the boat?

A. That ought not to have any effect amidships.

Q. Just explain to the court why it would not have.

—. ——.

Q. Why would not a break in the forefoot have that effect?

A. The forefoot has not got any connection except by keelson.

Q. Then you might break the lower part of the stem, and, so far as the sustaining power of the boat amidships, where the cargo is placed, is concerned, it would not produce any effect at all?

A. It ought not to.

Q. That is, so far as sustaining power is concerned?

A. Of course, if there is a leak it would be different.

Recross-examination:

Q, You started to say something on your direct examination when you were interrupted, about the barge "Columbia" not being built for a barge?

A. She was built stronger than a barge.

Q. What was she built for?

470 A. She was built so that they could put machinery into her if they wanted to, and if they did not they could use her for a barge.

Q. She was built so that if they wanted to they could use her for a steamer?

A. Yes, sir.

(COURT:)

Q. You say that this boat or a boat or barge in a soft bottom, with a list, might go to pieces and collapse and still be seaworthy?

A. Yes.

(COURT:)

Q. Explain how a barge that was seaworthy in that position could break?

A. A barge like this coming down where the ground is not level, in soft mud, we will say, would have the whole bearing on that one side, and the other side would get no bearing at all; she has got a list, and this side (indicating) gets the whole weight and naturally she would go; she would be bound to go.

(COURT:)

Q. A kind of leverage?

A. Yes, and the other side is in clear water.

(Redirect:)

Q. Where would she naturally break?

A. In the bilge.

Q. Right along what you call the bilge strake?

A. Right in the bilge strake, right where this one is broken; now the whole weight comes on her when this side is afloat.

Excused.

Thereupon an adjournment was taken to Monday, August 28th, 1893, at 10 o'clock a. m.

AUGUST 28TH, 1893—10 o'clock a. m.

PAUL R. DEADY, a witness called on behalf of petitioners, being duly sworn, testified as follows:

471 Direct examination.

Questions by Mr. COTTON:

Q. What is your name?

A. Paul R. Deady.

Q. Are you one of the commissioners of the United States circuit court in Portland?

A. I am; for the district of Oregon.

Q. Were you such about the 22d of October, 1892?

A. Yes, sir.

Q. Was any claim filed before you on behalf of Balfour, Guthrie & Co. in the matter of limitation of liability of the owners of the barge "Columbia"?

Mr. Wood objects as immaterial.

The COURT: The testimony will be received subject to the objection.

A. I think not; I don't remember any.

Q. Have you examined to see?

A. I have. There were three claims filed, but they came from Judge Watson's office. Those are the only ones that I have on file.

(Cross:)

Q. Those claims from Judge Watson's office are the claims on account of the death of Peterson and Short, I suppose?

A. Peterson and Short are the names.

Excused.

B. R. PEGRAM recalled on behalf of petitioners.

Direct examination.

Questions by Mr. COTTON:

Q. What is your official connection with the Oregon Short Line & Utah Northern Railway Company?

A. Superintendent of water lines.

472 Q. Are you the secretary of that company?

A. No, sir.

Q. Or the president?

A. No, sir.

Q. Are you a member of its board of directors?

A. No, sir.

Q. Are you a member of the board of directors of the Oregon Railway & Navigation Company?

A. No, sir.

Q. Are you its secretary?

A. No, sir.

Q. Or president?

A. No, sir.

Q. To whom do you report?

A. Superintendent of the railroad.

Q. At Portland?

A. Yes, sir.

Q. Do you know to whom he reports?

A. I think he reports to the general manager.

Q. What position does Mr. Carstens occupy under you?

A. He is my boss carpenter.

Q. What did you tell him about making repairs on the barge "Columbia," if anything?

A. I told him just as I do everything, to put it in good order.

Q. Do you oversee those repairs yourself or did he attend to them himself?
A. I left them to him. I think he is a better judge than I.

Cross-examination.

Questions by Mr. WOOD:

Q. When did you order these repairs made?
A. About a year ago last March, I think.
Q. Where was the "Columbia" at that time?
A. She was either in the bone yard or being used.
473 Q. Do you know what the ordinary life of such a barge as the "Columbia" is?
A. It is owing to how she is kept up; if she is not kept up she may die in seven or eight years; if she is kept up and everything that is rotten is repaired you can keep her indefinitely.
Q. Can you keep her indefinitely by simply repairs?
A. Yes, enough of them.

Redirect examination:

Q. Do you know anything about the cargoes which they were in the habit of loading on the barge "Columbia"?
A. Captain Empkin told me——
Q. (Interrupting.) Do you know anything of your own knowledge?
A. No, sir, nothing but hearsay.
Q. You don't know anything of your own knowledge?
A. No, sir.

(Recross:)

Q. In making these repairs was there any limitation put upon the amount to be spent upon the boat?
A. Not at all, no, sir; they were never limited.

Excused.

N. J. BLAGEN, a witness called on behalf of the petitioners, being duly sworn, testified as follows:

Direct examination.

Questions by Mr. COTTON:

—. Mr. Blagen, here are some pieces that were introduced in evidence after you were on the stand. Do you know what part of the barge they came from?
474 A. Yes, sir.
Q. Whereabouts?
A. Right from the end of one of the knees that was broken off.
Q. How do you know that?
A. I know that by the looks of it and by the looks of all of the rest of them that they are very much alike where they are broken off, in the same place that is, if they came from there.

Q. That is, if they came from the barge at all?
A. Yes, sir.
Q. How does that specimen of timber compare with the knees that you examined near the breaks in the barge?
A. That compares very favorably with the exception of one; I should say that this was a very fair sample of all of them with the exception of one near the break. (Referring to Rutter Exhibit No. 3.)
Q. How many knees are there on both sides of the barge? About how far apart were the knees, do you know?
A. I did not measure them, but I should say they were about three feet; it would vary a little perhaps from that, but that is about it.
Q. Referring to these pieces, which has been chopped out of some nineteen knees, so one witness stated, how do they compare; that is, the quality of the timber and general appearance with the pieces which you chopped into (showing the witness Olsen's exhibit)?
A. I should say that is a very fair sample of the general
475 run of the knees, that is what it refers to, as I understand, knees.
Q. Yes; I understood you to say the other day that you had not examined the transom; by that I mean the stern—that is, the rear portion of the boat, the hind piece?
A. I did not know the terms at the time.
Q. Did you see that piece?
A. Yes, sir; the extreme stern of the boat on top—that is, the back part of it.
Q. Did you examine that?
A. No, sir; I did not examine that; only just looked at it.
Q. That is, you did not chop into it?
A. No, sir.
Q. Did you look at it?
A. Yes, sir.
Q. Were you in a position to see how the wood appeared?
A. I could only see the deck part of it; that looked very good.

No cross-examination.
Excused.

P. CARSTENS, a witness called on behalf of petitioners, being duly sworn, testified as follows:

Direct examination.

Questions by Mr. COTTON:

Q. Mr. Carstens, what is your occupation?
A. Ship carpenter and builder.
Q. How long have you lived in Portland?
A. I have been here since 1876.
476 Q. How many years have you been engaged in ship-carpentering and boat-building?

A. About 28 years.

Q. Where have you worked?

A. I have worked a good many different places; I worked in the old country and upon the big lakes and up here on Snake river, and a good many other places.

Q. How long have you been at work here in Portland?

A. About ten years altogether, I guess; I have done work all of the time since 1876; I have been in the up country at Snake river about five years.

Q. What work have you been doing since you have been here on the Columbia and Willamette rivers; for whom have you been working?

A. Building steamboats and repairing them.

Q. For whom?

A. The Union Pacific Company the most of the time.

Q. Have you been working for that company for 15 years?

A. Yes.

Q. In what position?

A. Foreman all of the time for the work.

Q. That is, the steamboat work?

A. Yes; repairing steamboats.

Q. And part of the time were you working for the old Steam Navigation Company?

A. Yes.

Q. And then the Oregon Railway & Navigation Company?

A. Yes.

Q. And then the Oregon Short Line?

A. Yes.

477 Q. And all of this time you have been foreman of the work?

A. Yes, sir; well, not all of the time; I worked a year or two for them as carpenter before I started in to be foreman.

Q. General managers have come and gone but you have stayed?

A. Yes, sir.

Q. What is the nature of your duties; what do you do; what particular work?

A. I look over all the company's boats, keep them in repair, and see that they are always in good order; if there is anything the matter with them I am supposed to repair them.

Q. How do you get your help?

A. I pick them up; I keep three or four men most all of the time; when I have a job to do I pick them up, and when they are through I discharge them again.

Q. Did you do any work on the barge "Columbia" in the year 1892?

A. Yes, sir.

Q. How long were you at work on her?

A. A month or five weeks—about four weeks, I think, we worked on her.

Q. Do you know what the value of the repairs was that you made on her at that time?

A. I don't know exactly, because I don't buy the material, but my estimate was $1,500, and I think we overran that a little; I did not go into it very deep because I did not want her to run over my estimate; I did not inquire into the cost of the material; I did not buy the material myself; I have another man who buys the material; so I did not keep very good track of it.

478 Q. How many men did you have at work upon her during this 30 days?

A. About ten men working on her altogether.

Q. Who were they; that is, what character of men were they; were they shipwrights?

A. Yes, ship carpenters; they had been in business a good many years.

Q. What was the character of the repairs which you made to her?

A. They were mostly all on the deck; we put a new guard on her all around and partly new deck and new bow, and some new deck in front and partly new transom; sheathed her deck over, the whole deck; put some calking on the outside, a little.

Q. Who told you what repairs to make, or how did you reach the conclusion as to what repairs you should make?

A. The busses was pretty well worn outside the guards; they were exposed all of the time knocking against the wharves and steamboats and other things; they get mostly knocked up and get out of repair, and they were getting pretty bad, and I told Captain Pegram that she needed a good overhauling on the deck. He said: "We are liable to do work on her this fall, and go to work and put her in good order," and I started in to work on them.

Q. How did you find out what was necessary to be done; did you make any examination of her?

A. Yes, I went over the hull of her two or three times with a hammer and chisel and a small bit, and I examined the barge well all over and I found her in a very good condition except her

479 deck frames were bad, and I concluded that was all I need to do to her, and fix up the guards—what I said before; that is what we did to her.

Q. Did you fix up any of the frames?

A. We put three or four pieces of frames in under the forward where her hog chains came, alongside of the hull; there were two or three frames, I think three, where the chains settled, and about six inches at the top end of those were rotten and we stuck in three or four knee pieces alongside of it on the side and fastened it to the old frame and onto the planking; the hog chains were slackening and water would come further down and cause a leak there, and cause the frames to rot; we also put in a piece of sheer strake on one side, the top plank on the outside was rotten there and we put a new piece in there too; that was all of any account that we found in her, except there might have been a small piece where there was a little piece of sap, a half-inch sap in the wood; there might have been a little rotten in the sap; it gets rotten once in a while.

Q. Did you make a cross-section of the barge?

A. Yes, sir, I did.

Mr. COTTON: That has been referred to, so I will put it in evidence.

Q. That represents the barge about where?

A. That is a cross-section of her just about in the middle.

Q. Just about in the middle of her?

A. Yes, sir; that is exactly how she was built, the size of the timber and everything.

Q. What was her shape so far as being square is concerned,
480 having a square bow and a square stern or a sharp stern; what was the general shape of the bottom of the boat?

A. She is what we call a round-bottomed boat, a sharp bow and a round stern; steamers have a curious kind of sterns; they do not use the ordinary kind of sterns on the Columbia river; she had the same kind of a stern as they use, a wide stern, only across her midsection a little narrower, and the bow was straight up and down, sharp.

Q. I wish you would explain to the court the way in which the bottom and side timbers of the barge are connected with each other; that is, indicate what you mean by the floor timbers and the lap piece and the side frames or frames; just take a pencil and explain that drawing so as to indicate and letter it in some way so that we may have it clear. I wish you would say, commencing under the deck, running down, because when you say from here and there it is not definite. Letter the pieces if necessary.

A. From the top of the deck beams to below the turn of the bilge forms what we call the top timber; that we cut out of the natural crook. From the bottom of the top timber to the center of the midship keelson that is what we call the floor timber; that is cut out of a straight piece of timber; then right over the floor timber, the joint at the keelson, that is the lap piece, also cut out of a separate piece, and that was fastened with the spike into the original frame.

Q. The joint between what?

A. The joint to connect the upper end of the top timber to
481 the floor timber; that is also spiked into the frame; that is the way that frame was built up. In putting these lap pieces on the boat or putting the keelsons in the boat, we always put the keelsons over the lap pieces, so that in case the boat works sideways the keelsons support the ends of lap pieces.

Q. What do you mean by the keelsons?

A. I mean the timber that runs fore and aft in the bottom of the boat.

Q. How many are there?

A. There are five in this boat.

(COURT:)

Q. These are keelsons (indicating on diagram)?

A. These are keelsons, and these (indicating) are stanchions on top of the keelsons; the keelsons run from here to here (indicating).

Q. Those keelsons are numbered from 1 to 5?

A. Yes, sir.

(COURT:)

Q. Those keelsons come up only a short distance from the bottom?

A. Yes, sir.

(COURT:)

Q. On the top of the keelsons are posts, timbers?

A. Yes, sir.

Q. How far apart are those posts?

A. The posts run near to the deck beams, and the deck beams are twenty two inches from the center, and eighteen inches apart; that will be three feet between the posts.

Q. Do you know the size of these posts?

A. Six by six.

Q. There are upright timbers on the top of the keelsons?

A. Yes, sir.

Q. What are those pieces along the side numbered 6 and 7?

A. Bilge strake.

482 Q. What are these pieces up here at the top of the timbers numbered 8 and 9?

A. Clamp strakes.

Q. What is this piece on the outside numbered 10?

A. Sheer strake.

Q. What are the clamp strakes and the sheer strakes for; how are they fastened together?

A. With screw-bolts run through the whole business like this, and also spiked first, and there were two spikes in each frame and two screw-bolts in each frame.

Q. On what do you place the deck timbers?

A. On top of the sheer strake and clamp strake.

Q. Are they supported in any other way in the middle?

A. In the middle they are supported by stanchions from the top to the bottom of the deck beams.

Q. How large are the deck beams?

A. Four by six.

Q. How large are the keelsons?

A. The dimensions of the keelsons, two pieces are six by eight, one piece on top of another, that would be six by thirty-six of the whole height of midship keelson.

Q. Does that run from one end of the boat to the other?

A. Yes, sir.

Q. To what is the forefoot or stem fastened?

A. The stem is fastened to the keelson; it terminates in a knee right forward; where the keelson comes up to the stem is a b[illegible] knee for your inside, and the stem—we call it a deadwood—is fastened

483 to the keelson, and runs clear forward to the extreme end of the boat, and on top of that is a big knee on the inside, which has formed a corner there, and they are bolted together on the inside.

Q. What is the transom and where is it?

A. It is at the extreme after end of the boat. You want to know what the transom is?

Q. What is the transom, yes?

A. The transom itself is made out of 3 by 6 inch planks; I don't remember quite, but I think it was 5 feet high from the whole business amidships, and that was fastened to a big knee that sets inside, and each one of the keelsons there has a big knee that runs up above the transom, and the transom is fastened to that knee and bolted to the keelson and bolted to the knees.

Q. How far through the boat do the keelsons extend, the keelsons other than the amidship keelsons?

A. All the keelsons run from one end of the boat to the other, except the outside keelsons; they run down to the point right forward where the boat gets sharp; it runs out to a point there that must have been, probably, about 40 feet from the forward end of the boat.

(COURT:)

Q. They connect them with the amidship keelson, do they?

A. The side ones connect. The boat runs out to nothing, but these are bolted together with the amidship keelsons (referring to diagram).

Q. What method has been taken, if any, to preserve this boat from rotting?

A. She was well ventilated, for one thing; there were hatches along the sides of the boat and her deck; this boat did not
484 do service more than about two months in a year, the balance of the time she lay in the bone yard and she was cleaned out and fresh air circulated through the boat; that is a great thing to keep a boat; and besides that, the salt jugs, which is a small piece between the frames underneath the clamp strake, was filled up with salt, I should think about 15 or 20 tons of salt were put in that boat when she was built; besides that, it was inspected every once in a while and whatever was thought to be necessary was done.

Q. You say you examined this boat and tested it with an auger. How much rotten wood did you find?

A. I did not find any rotten wood except in the frames, in the keelson, except that once in a while we could find a corner of the floor timbers where there had been some sappy wood in, there might have been a piece about 6 inches long, and in the corner, starting down from nothing and going over to about an inch in the other corner, I found several places in there; that is all of the rotten wood I found; when I started in repairing her I found a little more; that is, I found some frames, as I said before, where the hog chains came in.

Q. What was the cause of this little strip of rotting that you found on the timbers?

A. Sappy wood; the sap comes in where you build a boat; you can't find it hardly but you get more or less of it in sometimes;

when I build a boat myself and see anything of it, I take an ax and cut it away because it will rot in a couple of years anyway.

485 Q. If you should find in a new knee a tendency in that direction, you would chop that off, would you, and put the knee in?

A. Yes, I always do that.

Q. In what condition was this boat repaired; how did you turn her over when you completed her?

A. I did all I could find to do. The only thing more I could have done, and I probably would have done it if they had not been so busy, was to give her a coat of paint in the hold; I was thinking of doing that but I was busy and did not get a chance.

Q. How would the "Columbia" compare with other barges used on the Columbia river so far as the size of her timbers is concerned?

A. She was built fully as strong as any; in fact there are not many barges of this kind on the river, but she was built stronger, as any of the river steamers would be built; there is only one more barge like this on the river and that belongs to the Willamette Mill Co. I consider our barges are good and strong. This barge was built out of straight timber in place of natural crooks.

Q. How would this kind of barge that you refer to compare with the ordinary steamboat? Would it be better or worse than barges generally?

A. It would be better; the ordinary steamboats are built a good deal like this boat.

Q. And are expected to carry machinery too?

A. Yes, sir.

Q. You were not here when that barge was built originally, were you?

A. No.

Q. Who superintended these repairs on the boat?

A. I always did.

486 Q. Did you superintend the repairs on the "Columbia"?

A. Yes, sir, I was there all the time. I don't superintend all of the repairing; I do it mostly, but before last year when we had boats over on Puget sound running, I was over there a good deal and the foreman, Mr. Rogers, was down at the boat yard. But this particular repairing on the "Columbia" I superintended myself all of the time.

Q. Was Mr. Rogers there too?

A. Yes, sir.

Q. Who is Mr. Rogers?

A. He is foreman at the bone yard.

Q. How do these stanchions that you refer to run; do they run straight up and down, or how?

A. Straight up and down.

Q. Directly up and down?

A. Yes, sir.

Q. And those are about three feet apart the entire length of the barge?

A. Yes, sir.

Q. And run up and down from each of the keelsons?
A. Yes, sir.
Q. Have you examined this barge recently?
A. Yes, I saw it over on the beach where she lies now.
Q. Did you see her right after the accident?
A. Yes, sir.
Q. How was she lying right after the accident?
A. She lay inside of the wharf down at Astoria, with her port side underneath the water and broken down, and her starboard side, her guard was about two feet above the water in high tide, and just a little of the guard amidships sticking out of the side; in
487 low tide, you could get down on the bow forward; she was lying over on her side and at an angle, I should think of about forty-five degrees.
Q. The port side, I understand, was thrown out in the water, here (indicating on diagram) from the deck?
A. Yes, sir.
Q. Where was the starboard side?
A. It was thrown over top of the beach.
Q. Thrown over on top of the beach?
A. Yes, sir—not thrown in altogether; just enough so that you could see it, sort of broke in, where you could see it right by the bilge; the planking was bent there, and you could tell by that where the planking broke in, and afterwards you could see the port side taken out and the transom followed the port side over, and you could see the transom about eighteen inches from the starboard side.
Q. The transom was pulled out from the starboard side and fastened to the port side?
A. Yes, sir.
Q. You have examined it since, as she lies down there, have you?
A. Yes, sir.
Q. Where did the break on the starboard side occur?
A. On the starboard side she broke right in her bilge.
Q. Did she break above or below the bilge?
A. Just below the bilge strake.
Q. On the starboard side?
A. Yes, she broke below the bilge strake in the middle, right below the bilge strake, but when she came forward the bilge strakes do not run parallel with the water line; the bilge lies up against the sheer strake forward; she broke below there.
488 Q. Where did she break on the port side?
A. She broke below the bilge strake.
Q. Did she break in the frames, or in what part?
A. The port side of the boat; she broke in the frame; right in the bilge. Where the largest part of the bottom of the boat was I counted sixteen frames that were broken right amidships below the bilge strake; there were a few others scattered and broken; most of them were pulled apart.
Q. But right in the center you say there was how many broken?

A. I counted sixteen.

Q. Were they continuous?

A. Yes, there were sixteen continuous and then there was one whole and then there was another one broken again right by there.

Q. Did you examine the appearance of these frames?

A. Yes, sir; I did.

Q. What examination did you make of them?

A. I went and looked at all of them and I had a big knife and also a hammer, and I knocked at them and cut them with my knife.

Q. In what condition did you find the frames?

A. I found the frames all good and sound.

Q. What was the condition of the planking along there; just describe the port side as you found it laying there on the beach a short time ago?

A. The port side lies there on the beach all in one piece, from the extreme after end to within—we broke about twenty feet of it when we pulled it up; it was all imbedded in the sand, and we had to pull two or three times before we got it out of the sand, and we broke out a piece forward of it, but besides that, the whole
489 port side lies there and is practically all whole, the same as if you might say it was put together yesterday; that is, I don't see any difference in it; that is from the top of the deck. The bilge strake is down on that side and all of the top timbers that are broken are fastened to the side there yet and lie there all whole and nice.

Q. The sheer strake and clamp strake?

A. The sheer strake and clamp strake and the whole side is there, down to her bilge strake, the outside planking down to her bilge strake.

Q. Is the bilge strake there too?

A. The bilge strake is there, yes, sir.

Q. That is, the whole side from a little bit below the bilge strake is there?

A. Yes, sir, you can't see any of the joints worked loose, they all appear like it was, as good as when they were put in there before.

Q. Then I understand that this side did not flush down and mash it but broke off; that is the appearance of it, is it?

A. Yes, sir, broke right off.

Q. The deck timbers did not break down and crush down?

A. No, sir, neither did they split down, they followed the grain of the wood and split in the bend there.

Q. How large were these frames at the place where they broke?

A. The frame was 4 by 12 in the center keelson and 4 by 8½ at the bilge strake, and 4 by 4½ at the top.

490 Q. What are the hog chains; what have they to do with a boat and where are they located?

A. They are located right in the center of the boat. There are four chains that come down as near as you can get to each corner of the boat; they are there to help support the boat and carry her cargo and keep her in shape and keep her from twisting.

Q. Did you see some of the bottom?

A. Besides that she has got what we call side chains, three posts on each side of the boat standing on the outside keelsons, and connected on top of each other, and they run down to the bow like an arch of a bridge.

Q. In what way was this boat intended to support weight?

A. By floating in the water.

Q. But I mean straining, how?

A. Straight up and down.

Q. What is the effect when you get her leaning?

A. The effect of giving her a lean, if it was a little lean, it would not amount to anything, but much of it will throw the hog post from standing up plumb, and if they got out sideways on the chains there they would naturally break the post, and would strain or break the boat more or less.

Q. The stanchions run straight up and down and the frame is comparatively straight up and down?

A. Yes, sir.

Q. Was she intended to support weight when leaning over on her bilge?

A. No, sir.

Q. Why not?

A. The structure of a boat would not hardly admit of that;

491 it would throw the weight of her more or less on one side, if the boat got from a straight position.

Q. Did you see any part of the bottom the day that you were down there a short time ago?

A. Yes, I saw the whole bottom.

Q. What was the condition of the bottom?

A. Good.

Q. Did you see the knees on the starboard side—that is, the broken pieces of knees?

A. Yes, sir; I saw them all.

Q. What was their condition?

A. I examined all of them and I found them all good.

Q. How did the knees of the boat compare with these pieces which you saw here, so far as quality of timber is concerned?

A. It compares well with it; I have been looking at that timber and I think that is a fair sample of it.

Q. Since your examination of the boat as she lay there the other day, did you discover more rot or any tendency to rot, more than you discovered at the time that you inspected her for the purpose of making repairs?

A. No, sir; I was surprised at the hardness of the timbers; I did not expect that the timber would be as hard as it was, but some of the timber was as hard as a piece of oak timber.

Q. What is the appearance of the bottom there, the way in which it lies; what pieces of the bottom are there and how do they lie with respect to each other?

492 A. The whole bottom is there from the stern to within thirty feet from the stern, in one piece, and we sawed within

thirty feet from her stern, and these pieces are there also, but split up in two pieces; she parted right amidships, so the two after sides lay there.

Q. Is this piece of the stern which was taken of from the bottom sawed or broken off?

A. It is sawed right off?

Q. Do you know who sawed it off?

A. Mr. Rutter sawed it.

Q. It was not sawed by the accident?

A. No; afterwards they got it inside of the breakwater.

Q. Are the keelsons fastened to the bottom there now or not?

A. Yes, sir; they are fastened to the bottom; they never started a bit.

Q. Did you see the stem?

A. Yes, sir.

Q. Where was the stem?

A. The stem we broke off about 20 feet long; we broke that by pulling it out of the mud; that was lying up to the breakwater outside; the stem was fastened to that piece; I wanted to take that piece out of the boat and I had to lift it up there.

Q. What repairs did you make to the house and deck beams on this barge?

A. I cut them all off even with the outside of the sheer strake, all of the old beams, and then I put in these knee pieces; they were put in to the first stringer, went down there about 2 feet and took up all of the deck outside of the house and put a new covering board, new nosing in.

493 Q. Did you raise the house up?

A. I raised the house up and put new sills underneath the house.

Q. Explain to the court what connection, if any, the stem has with the supporting part of the boat amidships; how is that connected with the boat amidships?

The COURT: I think he has explained that already.

(COURT:)

Q. Explain what connection the center keelson and the two keelsons have with the supporting power?

A. The stem is made out of a piece of timber 8 inches thick and 18 inches wide, and that runs down to what we call the forefoot. The forefoot is the round part underneath the belly of the boat, and the stem runs down to that part and fastens to it and fastens into this knee on top of the keelsons, that was supposed to be standing on the boat, and on top the ceiling; that is, the clamp and sheer strakes are fastened to the stem; all of the top planking is fastened to the stem.

Q. Would these planks run around continuously? How do the planks run; about how long are the planks on the boat?

A. Different lengths, from 20 to 50 feet.

Q. How wide was this boat?

A. About 190 feet long.
Q. How far back from the stem was the house?
A. Twenty-four feet from the stem to the house.
Q. The stem then, is practically a sort of a forward frame or rib?
A. Yes.
494 Q. What are the dimensions of the side frame right near the knuckles?
A. The side frames are 4 inches thick by 8½ inches in the bilge and 4½ in the top.
Q. How far apart are they in this boat?
A. Twenty-two inches from center to center, that would make 18 inches between them.

(COURT:)

Q. What was the condition of this wreck as to the stem or nose piece when you saw it?
A. When it was lying sunk there I could not see much of it. I looked at it in the daytime but I did not go far enough down to see it, but at night when I looked at it I was down by the boat and the stem was all broken in; she struck against a float that lies against the dock and she smashed the stem right in.

(COURT:)

Q. She struck against a float?
A. Yes, sir. There is a float that lies at the dock.

(COURT:)

Q. A fender?
A. Yes, sir.
Q. Whereabouts is this forced in, do you remember?
A. The stem?
Q. Yes.
A. Just below her water line when her bows were loaded.
Q. Is that where the stem or forefoot was?
A. The stem.
Q. How much was it forced in?
A. Fourteen inches outside of the planking and they were all just smashed in.
Q. Separated from the planks a little, was it?
A. By the looks of her she did not strike below; she must have struck glancing below a little; the stern was lying over to
495 one side and they bent the plank up and down there, and there was just about an inch; so the stern looks like it had been carried on to one side.

(COURT:)

Q. At that part where the opening was what was the condition of the timber as to soundness?
A. The stem that was in there was about two years old, the stem was put in about two years before, and a year before the repairing and the planking was all good.

(COURT:)

Q. Was the stem good?

A. Yes, sir. There was a knee piece put in, as I say, a year before, we repaired her; she ran across the wharf or some place and broke the stem, and we put a new stem in her the summer before.

Q. You say she lost her stem how long before?

A. She lost her stem——

Mr. WOOD (interrupting): Can you answer the question of your own knowledge?

The WITNESS: Yes, sir, I know that of my own knowledge.

Q. Did you put this new stem in?

A. Yes, sir.

Q. Was that a new timber?

A. Yes, sir.

Q. What was the condition of that timber when you looked at it the other day?

A. It was as good as new.

Q. Was it broken?

A. Yes, sir, it was, all bursted out to the lower end of it, the water line.

Q. Pushed out?

A. Bursted out and broken in.

Q. How far did the guards extend over the side?

A. They extended right amidships; they extended three
496 feet outside of the boat, but forward they extended about what we call right in the bow of the boat; they extended about four feet; they are a little wider there, and also on the front end it extends out about six feet on the transom.

Q. What are the guards for?

A. To protect a boat in making landings and in laying up against wharves, and are also for making a gangway when a barge has a cargo in, so you can get from one to another without getting on top of the house.

Q. How did the condition of this boat when you sent it out compare with the condition of the "Autocrat," the "Columbia Chief" and other barges used on the river here?

Mr. WOOD objects as incompetent and immaterial.

The COURT: The testimony may be taken subject to the objection, if the witness knows.

Q. Have you examined the "Autocrat," the "Columbia Chief" and the Willamette Mill Company's boat that you speak of?

A. Yes, sir; we considered her the best of the three; we had there the best boat of the three.

Q. Have you seen more or less of the barges which are used by people around here on the Willamette and Columbia rivers?

A. Yes, sir.

Q. Did you see them and examine them more or less?

A. Yes, sir.

Q. How did she compare when you turned her out, with those barges which you have examined and which are used here on the Columbia and Willamette rivers?

A. She is a good deal better than any other barges on the
497 river are; most of the other barges on this river are simply flat scows.

Q. What kind of frames do these flat scows have?

A. Some of them have no frame at all; besides, they are built differently, and in some the side makes the frame.

Mr. WOOD: All this is objected to as immaterial.

Q. That is, the planking makes the frame?

A. Yes, sir.

Q. And they have no ribs inside of them at all?

A. No, sir.

Q. Are you a director of the Oregon Railway & Navigation Company?

A. No, sir.

Q. Are you a member of the board of directors of the Oregon Short Line & Utah Northern?

A. No, sir.

Q. Have you ever been?

A. No, sir.

Q. Or the Oregon Short Line?

A. No, sir.

Q. Are you the president of the Oregon Short Line & Utah Northern?

A. No, sir.

Q. Or of the Oregon Railway & Navigation Company?

A. No, sir.

Q. Are you the secretary of either of those companies?

A. No, sir.

Q. Have you ever been?

A. No.

Q. Have you ever been president of either of the companies?

A. No, sir.

Cross-examination.

Questions by Mr. WOOD:

Q. Mr. Carstens, you say that the barge "Columbia" was built in a superior way to the other barges. In what way was she superior?

498 A. I don't remember saying that, in a superior way to the other barges. The "Autocrat," the "Columbia," and the "Columbia Chief" were all built alike.

Q. You said the "Columbia" was the best of the three.

A. She was better preserved than the others. The "Autocrat," the mate of the "Columbia," was aground two years ago and got all broken up, and we have not repaired her since.

Q. You say you have not repaired her?

A. No; that is, the "Autocrat," the mate of this one.

Q. You stated in your direct examination that you sawed out these knees for the "Columbia" from the natural crook, and afterwards you said you did not build her yourself?

A. I said they were made out of a natural crook. I did not say I did it. That is what I meant to say; I thought I said so.

Q. You said something also to the effect that the barge "Columbia" was built like a steamer, a regular steamboat. Did you not say something to that effect?

A. Yes, sir.

Q. Does a steamboat have to be stronger than a barge?

A. Not necessarily.

Q. Where are these hog chains that you have spoken of fastened; exactly to what timbers are they fastened at the four corners?

A. The main chains from the center hog post, aft, were fastened to the side keelson shaft right down in the bottom of the side
499 transom, the after end, and the forward end comes down to the side keelsons, about thirty feet from her stem.

Q. Do you know the dimensions of the "Columbia." What was her greatest width of beam?

A. Thirty feet.

Q. Her length you have already testified to?

A. Her planking besides that would be thirty feet, and sixty inches her largest beam.

Q. What is her depth?

A. Eight feet amidships.

Q. Do you know what her draft of water is when light?

A. Her draft light is about 2 feet forward and about 14 inches aft.

Q. And what was it when she was loaded?

A. That depended on how she was loaded.

Q. Say a full load?

A. With a full load she ought to draw 6 feet or about 6½ feet.

Q. (Referring to diagram.) This is a cross-section of the barge "Columbia," about amidships, is it?

A. Just about amidships, yes.

Q. And about how far fore and aft from this point does she carry this bottom before she begins to sharpen either way?

A. She starts in gradually and straightens out until she comes into the stem.

Q. What I mean is, what length in feet, on her bottom does she carry this flat piece here?

A. It is flat here on the bottom.

Q. This flatness here without sharpening?

500 A. That is what we call a floor. She is right flat on the bottom; from here to here (indicating on diagram), and she carries that pretty well forward. This is a section here forward about 10 feet from her stem (indicating), which would come up and be something like this; about 10 feet from the stem.

Q. About 10 feet from the stem is where this would begin to alter; is that correct?

A. Yes, sir; it would partly commence from the stem and it runs from the point right there and then this starts in very near to the stem and the flat floor until they gradually join into this line over here (indicating).

Q. How far does this floor go aft?

A. Clear to the transom. The transom is something like this (indicating); only it would be here (indicating), coming in this way. That would be the transom.

Q. How much is her dead rise? Is that drawn to a scale?

A. Yes, 1 inch to 1 foot.

Q. Just mark there with letters to what point you measure the dead rise?

A. The dead rise is a thing that is not measured exactly alike by any two persons. When you want to know the dead rise on a ship you say a quarter breadth, half the way from the sides, from the middle into the sides; that is the place where they count the dead rise. That would be just about here (indicating). She did not have any dead rise there more than a couple of inches right amidships; her bilge runs around this way (indicating).

(COURT:)

501 Q. The dead rise is counted from a point about half way between the center keelson and the extreme side of the boat?

A. Yes, sir.

Q. You say this boat nowhere has a keel projecting below the water?

A. She only has the aft, the piece aft which branches out amidships.

Q. But it is on a level with the floor?

A. The amidships is but forward and aft is below the bottom of the plank.

Q. How much?

A. Forward in the extreme end of the stem must be about 6 inches and aft about 2 inches below the bottom.

Q. That is, about how long from the stem, back to the floor?

A. About 50 feet.

Q. And from the transom to the floor?

A. About 30 feet.

Q. Now, if I understand you correctly, you said that if the hog posts were broken, the support given by the hog chains would be gone and she would have a tendency to warp or twist or straighten or break, something of that kind. I wish you would explain that again. Suppose that the support of the hog chain is gone and the chains from any cause are slackened, what effect would that have on a boat?

A. There is always some strain on the hog chains when they lower the boat; if the boat should be lowered in the middle the hog chains will slacken up, but if it should be lowered on both ends altogether, if the hog chains are not strong enough to hold it, they will break and that would naturally break the boat.

502 Q. So that anything that lessens the strain on the hog chains has a tendency to weaken the boat and cause it to break; is that true?

A. If she is not properly loaded. If she was properly loaded, and was loaded straight up, it would not have any effect, but that would depend on how the boat was loaded; if she was loaded so there was too much strain on the hog post and it broke, that would straighten the boat out.

Q. Suppose she was properly loaded but some accident happened; breaking of the hog chains or some accident, although properly loaded, still the strain is taken off the hog chains?

A. Suppose the boat is in its right position, you say?

Q. Suppose she is in her right position and some accident happens so that the hog chains are slackened up?

A. It would not necessarily hurt a boat if she is properly loaded.

Q. Suppose the hog post breaks?

A. That would depend on how the boat was loaded. If she was loaded so there was any weight on the hog chains and the hog chains broke, it might break the boat. But if she was loaded right, just strained enough on the hog chains, it will not hurt a boat, and the boat lays in the right position, it would not hurt a boat if it should break.

Q. Now, if the hog chains are broken there is a greater tendency to twist the boat, is there not?

A. That would depend on her loading, too.

Q. In what way?

503 A. If there should be more load on one corner than on another corner of the boat, it would have a tendency to twist the boat.

Q. In the case of this boat, with the stem smashed in, as you saw it, would not that have a tendency to weaken the boat so that she would twist if there was any side strain put upon her?

A. No, not necessarily; breaking the stem of a boat would not hurt a boat particularly. Of course, it would not do her any good, but I don't consider it would weaken the boat any.

Q. You don't consider it would weaken it any?

A. Smashing the stem would not do a boat any good, but no harm particularly for holding together.

Q. Would not that have a tendency to weaken the sides of the boat where they join in the stem? Now, is not a boat less strong at that point, that portion where the stem is broken?

A. If there was enough of it broken down altogether, but there is wood inside where the planking is fastened to shelves; that would not be started, it would not necessarily do it.

Q. But it all tends to weaken it?

A. Somewhat tends to it.

Q. It would weaken her at her junction with two sides, and have a tendency to twist the boat?

A. It won't necessarily do it because there is a piece of wood up and down inside the stem where the plank ends are fastened, and

as long as that is not started, it will not necessarily weaken the boat.

Q. What are the dimensions of this inside piece that you speak of?

504 A. It kind of took a piece to fill in between the two plankings, and it runs back about sixteen inches, I think; that would be about four inches thick on the forward side and ten inches on the after side; that is the main support of the hood end.

Q. And what are the dimensions of the stem?

A. The stem outside is eight inches thick and about fourteen inches wide.

Q. What is the connection between the stem and the hood end?

A. The stem would go to that apron, to that inside piece.

Q. The hood end?

A. No, not the hood end.

Q. To this piece that you say you rely upon for support; is that connected with the stem?

A. Yes, it is bolted into the stem; that is what holds it there. I can draw a diagram showing the connection.

Q. Draw in the stem there, the forward connection, if you will?

A. This (referring to 1–1) is the stem of the boat; 2 is the apron; 3–3 is the sheer strake. If she should strike again after the stem is injured she would be likely to knock away the planking.

Q. How are one and two fastened together?

A. Bolted together.

Q. What are the dimensions of the iron bolt?

A. The size of the bolt would be about $\frac{7}{8}$ths inch on the inside; or an inch on the inside.

Q. I wish you would draw there a profile of the bow showing where the stem begins to round off, the stem of the forefoot?

505 A. (Witness refers to diagram.) 1 is the stem; 2 is the forefoot; 3 is the apron, and 4 is the knee.

(Redirect:)

Q. Where is the keelson?

A. Here, number 5.

Q. About how far down from the top of the stem is it to where it begins to curve at the perpendicular; I mean from the top of the stem down?

A. It is eight feet from the top down to where the curve commences.

Q. Do you know whether the barge "Columbia" had been repaired before this time that you put the repairs on her in 1892, with the exception of this stem repairing that you testified to; did she have any other repairs put on her that you know of?

A. The barges were all hauled out about five years ago in Stefen's yard and overhauled and calking put into them and some new planking put on them; that was about four or five years ago.

Q. Were any other repairs put on that you know of?

A. I was not here at that time when they had them put on; that

was all that was done to it to my knowledge, putting in a few pieces of planking and calking.

Q. You speak about the barge "Columbia" having been hauled out to the bone yard. Is she protected from the weather when she is hauled out there?

A. No, no more than she always is; she has a big house over her.

Q. No more than she is protected when she is afloat?

A. No.

Q. This repairing that you superintended, was that done while she was hauled out or while she was afloat?

A. She was afloat at that time.

506 Q. About how much of her was visible at low tide, when you examined her in Astoria?

A. The starboard side from her deck to her bilge and the bow of the boat and the deck.

Q. What was the depth of water did you think at that time?

A. It was low tide.

Q. What was its depth judging by the boat, the depth in water?

A. At extremely low water, eighteen inches or two feet, I cannot say which; I never measured it inside of her.

Q. You spoke about taking your knife and examining the frames and did not make yourself clear. Do you mean when you saw her at Smith's point, recently?

A. Yes, sir.

Q. As I understand you, you say that these boats are built to support their loads upright and on an even keel, afloat. That is what you said, is it not?

A. Yes.

Q. But when you say that a boat that was afloat in the river and by some shifting of the load or by meeting with some accident was thrown on her beam ends or on to her bilge, that if she tore apart and broke apart, she was a seaworthy or proper boat or barge?

A. If she threw off enough to shift her cargo I would say she was; yes.

Q. You would say that if she broke up, nevertheless she was a good boat?

A. Yes, sir; if she listed over enough to shift her cargo, I would say yes.

Q. Is not a barge expected to be put on her bilge, on her beam ends at some time?

507 A. No, sir.

Q. That is not to be expected?

A. No, we don't expect that of river boats.

Q. How about steamboats?

A. We don't expect them to lay over on their beam ends; we would expect a little list, but would not expect a boat to go on her beam ends.

Q. Suppose she had such a list that one guard, we will say, was touching the water?

A. That would not hurt boat any.

Q. How if the guard was partly under water?

A. So long as the cargo is not shifted, I don't think it would hurt a boat any.

Q. Would the sharpening of this boat at the two ends have any practical effect in listing her over, providing she was settling down on a soft bottom? Would there be any practical difference between her and a flat-bottomed barge in that respect?

A. There would be this difference, that it would throw the bulk of the weight more in one place in a flat boat; in a scow it would distribute the weight all over, but here it would throw the weight more in one point.

Q. That would be the only difference?

A. That would be about the only difference.

Q. What time in 1892 were these repairs put on the "Columbia"?

A. During the month of May.

Questions by Mr. LORD:

Q. Why was it that the barge "Columbia" lay in the bone yard except two months in the year; why was she not used the same as the other barges?

A. None are used more than about two or three months
508 in the year, during the busy grain season; that is the only time they are used.

Q. At this time in 1892 when repairs were made, were there any repairs made to the hull?

A. Yes.

Q. And repairs made to the planking, the inside planking?

A. No.

Q. Repairs were only made to the knees and frames and inside?

A. Yes.

Q. Was there any examination made of the outside of the hull?

A. Yes.

Q. Was there any calking done at this time?

A. Yes.

Q. You are positive about that?

A. Yes.

Q. What is the name of the gentleman who did the calking?

A. I think Mr. Bulger did the calking.

Q. Did he calk the outside of the hull?

A. He did not calk the outside of the hull; he calked the transom where they put new plank, and he also went over and examined the boat to see if she needed any calking in her hull and her sides; and I don't think he calked anything on the sides; he might have calked the butts, but I know he put some new planking in the transom, and as to that calking I won't say positively that he did it; I think he did; I won't be positive about it.

Q. You don't know that he made any examination of the rest of the hull, do you?

A. No, I am not positive about the men; I know that somebody did it, but I don't remember exactly if he did it; I think he did.

Q. Did you order anybody to do it?

A. Yes, sir.

Q. Whom did you order to do it?

509 A. I think it was Mr. Bulger, but I order men every day in different shops, and I can't swear that it was him, but to the best of my knowledge it was.

Q. How often is a vessel in its life supposed to need recalking, at an interval of how many years, ordinarily?

A. The calking in a boat ought to last ten or twelve years; the first calking ought to last ten or twelve years, and then it needs recalking, and that ought to last about ten or twelve years.

Q. Would the fact that a vessel, the same shape as the barge "Columbia," was setting upon the water during the summer months without any load upon her and was then loaded very heavily indeed, and set down in the water so that part of her guard was in the water, would that have a tendency to make her leak?

A. We don't load a barge so that she is down in the water.

Q. Suppose that she was loaded down there?

A. If they loaded her in the water she might leak underneath her deck beams.

Q. Would the fact that a vessel had remained without any load on top of the water, and then loaded, make it have a tendency to make her leaky along the planks on the outside?

A. They always look after that before a barge goes out in summer time.

Q. Would it or would it not?

A. That depends; if the barge is well calked once in dry weather it would not have that effect, no.

Q. Do you know how long this barge had been painted before on the outside of her house?

A. Four years.

510 Redirect examination:

Q. Four years before this had she been calked?

A. Yes, sir, and overhauled.

Q. Calked and painted?

A. Yes, sir.

Q. Do you know how many trips this boat made since she was repaired?

A. Since I repaired her?

Q. Yes, before this accident, or do you know?

A. I don't know exactly, only one or two trips; I think that was the first time.

Q. You said something about a dead rise. You said that if the dead rise was what distance?

A. A quarter of the breadth of the boat.

Q. A quarter of the breadth of the boat?

A. Yes.

Q. Now, what is the distance, when this boat was loaded, say about 5 or 6 feet; what was the distance from the water line up to the deck of the boat?

A. This last load she had on her?
Q. Yes, when she is loaded about 5 or 6 or 7 feet?
A. I should judge she drew 5 feet of water and she was 5 feet in the hold, and that would be 3 feet up to the top of the deck.
Q. What is that distance called?
A. The freeboard.
Q. What relation did the freeboard bear to the draught?
A. The English Lloyds and Franck Lloyds and the American underwriters allow 3 inches freeboard for every foot of draft.

(COURT:)

Q. What is a freeboard?
511 A. That is the distance from the top of the deck down to the bottom of the water; so much of the boat is out of the water and so much in the water.
Q. Now, you say that the stem was smashed, and you have made a diagram since that. Describe how the stem was smashed as you examined it that day, with reference to that diagram?
A. There is a part of the stem, about 2 feet, which was all bruised up; the wood was all bruised up, broken right in or smashed, or whatever you call it.
Q. Broken off?
A. No, but it was in a shape like a broom, all splintered up.
Q. What effect did that have upon the planking; what was the appearance of the planking; was the planking still fastened to this apron?
A. The planking was all right, but the stem was laid over and the seam was bent over about an inch.
Q. But the planking was still fastened to the apron, was it?
A. Yes, sir.

(COURT:)

Q. Was there a seam there to let the water in the boat?
A. Yes, sir.

(COURT:)

Q. The line on the diagram marked A B at either end?
A. That would let the water in in this direction.
Q. That would be the same line referred to?
A. Yes, sir.
Q. How wide are the guards right there at the bow; what is the width of the guards at the hold?
A. At the forward end they come even with the stem and
512 then they widen up on the side, so that about 10 feet from the stem they are about 4 feet wide.
Q. They start from nothing at the stem and in 10 feet get 4 feet?
A. Yes, sir.
Q. Project over the hull?
A. Yes, sir, project over the hull.
Q. Whereabouts do you say this stem was struck?
A. Just below her water line when she was loaded; I should

judge that it must have been about 7 feet, I think, from the top end on down.

Q. How was the top end of the stem; was that fastened to the sheer strake and clamp strake still?

A. It was fastened to the apron.

Q. How was it at the top end?

A. It was fastened to the apron there, too.

Q. What was the condition of the stem at the top end of the stem?

A. The top end was whole and good.

Q. Just smashed at the bottom?

A. Yes, sir; and the whole thing was twisted over to one side.

Q. What length was this seam?

A. I could not say how far that went underneath the water, but above the water it rose clear up to the top of the stem.

Q. When was this examination made?

A. I saw that next morning when I came down there, I think; I was down there after the accident happened.

Q. Had the boat pulled apart at that end at all in any other way?

A. Nothing more.

513 Q. That was the only pulling apart of the boat at the forward end at all, was it?

A. No.

Q. Was that the only pulling apart?

A. That was the only thing that was shown there.

Q. How far did you say it was pulled apart at the back end, at the stern?

A. The transom was pulled out about 18 inches from the side, and up here at this end (indicating) pulled apart about an inch.

Q. Up here it was pulled apart about an inch?

A. Yes; the size of the stem.

Q. And that was the only pulling apart at the front end at all, was it?

A. Yes.

Q. And this was the morning after the collapse?

A. Yes, sir.

Q. You speak about the keel. Do barges of this kind have keels?

A. Yes, all boats have keels.

Q. How does this keel compare with the keel of other boats; that is, boats built like her?

A. They are all about the same.

Q. Do river steamboats have the same kind of keels?

A. River steamboats have the same kind of keels, yes.

Q. She was not unseaworthy, then, because she did not have a keel?

A. No, she had a keel.

Q. She had the same kind of keel that ordinary river boats have?

A. Yes.

Q. And barges, the same kind of keel that the "Autocrat" and "Columbia Chief" have?

A. Yes, sir.

514 Recross-examination:

Q. Mr. Carstens, you spoke about Lloyd's rules. You don't know what Lloyd's rules are by an examination, do you; what you speak of is just hearsay, is it not?

A. About what?

Q. About the English and French Lloyds, about freeboards?

A. No, about loading the ship.

Q. I say, all you know about it is what you have heard, is it not?

A. Not exactly.

Q. What then, do you know about it?

A. I have loaded ships myself and I know that we went by that rule.

Q. You had to comply with that rule?

A. Yes, sir.

Q. Those were deep-sea ships?

A. Yes, sir.

Q. And those rules are for deep-sea ships?

A. Yes, sir; on the lakes it don't apply; they load them down to the top of the deck.

Q. All you know about this boat having hit a float is what you were told; that is your idea; you were not there; you don't know that she hit the float?

A. I don't understand you.

Q. You said that the stem was smashed in by hitting one of those fender floats. You don't know that of your own knowledge?

A. All I know is that I saw the mark on the float where the boat struck it.

Q. You did see the mark on the float?

A. Yes, sir.

The COURT: I don't know whether this witness is qualified
515 to state, but I would like to know if the fact that a boat is heavily loaded tends to make her more level than if she was not heavily loaded?

(Redirect:)

Q. What do you know about that?

A. I never was on board a particular boat when they were loading her; I don't think I would be a good judge of that; I never was on board of barges when they were being loaded.

Excused.

W. S. ROGERS, a witness called on behalf of petitioners, being duly sworn, testified as follows:

Direct examination.

Questions by Mr. COTTON:

Q. What is your occupation?

A. Carpenter.

Q. How long have you been a ship-builder?
A. Thirty-four years.
Q. Where have you worked?
A. In Portland for a few years and in San Francisco.
Q. How long have you been working in Portland?
A. Since 1872.
Q. In whose yards?
A. I worked for the Oregon Steam Navigation Company first, the Oregon Railway & Navigation Company and the Union Pacific system.
Q. Continuously, all of the time?
A. Mostly; I have built a couple of houses in the meantime, but mostly on steamers.
Q. Did you have anything to do with repairs on the barge "Columbia" some time during the spring of 1892?
A. Yes, sir.
516 Q. What position did you occupy?
A. Foreman.
Q. What repairs did you make?
A. We put in some frames, repaired her deck, transom, and what we call the covering boards, some beams.
Q. How long were you at work on her?
A. Part of March, in April and May.
Q. Did you make any examination of her prior to making these repairs?
A. Yes, sir.
Q. What did you do?
A. Went down in the hold to see what was rotten.
Q. Did you examine the timbers?
A. Most of them.
Q. Did you superintend the work?
A. Yes, sir; Mr. Carstens was there.
Q. Were you there all of the time?
A. Yes, sir.
Q. What was the condition of the frames and boat when she left the yard?
A. They were good.
Q. What was the condition of the boat generally?
A. Pretty good.
Q. Was she in a seaworthy condition?
A. You mean to go in the ocean or river?
Q. On the river.
A. She was.
Q. How did she compare in strength and construction with barges used on the river generally?
A. She would compare favorably; all the same, only a few more like her owned by the same company—only one.
Q. Were there any rotten frames in her when she was sent out?
A. Not that I saw.
Q. Did you examine the frames for the purpose of ascertaining whether there were any?

A. Yes, sir.

517 Q. Was there any work done about her in the way of calking her?

A. She was examined on the outside.

Q. Was any calking done?

A. Yes, sir; all of the butts were calked and new work put in, this piece of transom.

Q. How did she compare in strength with the general run of barges used on the river? What kind of barges do they use here, in the first place, flat bottom or round bottom?

A. Generally the barges have round bottoms and the scows are flat.

Q. That is the distinction between a barge and scow?

A. Yes, sir.

Q. Are you familiar with the condition of other barges that are used here?

A. Yes.

Q. Other round bottomed barges other than those belonging to the company?

A. Yes.

Q. How would she compare with the general run of barges used on the river; was she better or worse?

A. About the same, as far as I know.

Q. Was she worse than they were when she was turned out of the yard?

A. I have not examined those not belonging to the company.

Q. Did you consider her safe and seaworthy to send out when you sent her out?

A. Yes, sir.

Cross-examination.

Questions by Mr. WOOD:

Q. How long have you been working for the Union Pacific Company?

518 A. About 21 years, I think; I mean the three companies together.

Q. Have you examined any other barges than those belonging to the company?

A. No, sir.

Q. You have stated that you were familiar with other barges. What other barges are you familiar with?

A. I did not state that, I think.

Mr. WOOD: I may have misunderstood you.

The WITNESS: I said I had not examined outside barges; that is what I meant to say.

Q. What repairs were put on the barge "Columbia" other than those you speak of, at any other time?

A. There was new nosing put on.

Q. No general overhauling except this?

A. No; nothing except this.

Q. How long has she been built, do you know?
A. I worked on her when she was built, but I cannot state the date; I worked on her two or three years altogether.
Q. About what is the life of a barge of her character?
A. She would last 20 or 30 years with good care.

Redirect examination:

Q. Does the company let out work by contract?
A. Sometimes; the "Columbia" was built by contract.
Q. Was she ever repaired by contract?
A. I think so.

(Recross:)

Q. Do you know?
A. I could not say; Stefen did some work on her; I guess that was contract; I could not say.
519 Q. Then you don't mean to say that you know positively that no other repairs were made upon her during her life?
A. Not what Stefen done.
Q. I mean you don't know when you say that you did not repair her, that she was not repaired; you don't mean that?
A. No; anything repaired outside of the yard I don't know anything about.
Q. You said something about the nosing on her now and then breaking. What do you mean by the nosing?
A. The piece that goes around the guard that sticks outside of the hull.
Q. Had the stem been broken on her before?
A. Yes, sir.
Q. When had the stem been broken?
A. About two years ago it ran against something and turned it to one side, and we took it off and put another on.
Q. How did the barge get to you at that time when her stem was broken?
A. She was brought there.
Q. Where did she come from?
A. I don't know; she was just up from Astoria; I don't follow that up; I can't tell where they come from.
Q. She was afloat when she came to the bone yard, was she?
A. Yes, sir.
Q. Was she leaking, were you on board of her at that time?
A. Yes.
Q. Was she leaking when her stem was broken?

Mr. Wood objects as incompetent.
No ruling.

520 A. No, she was not; the whole of the stem, just the upper part of it; I suppose if it had been broken an inch it would have leaked.

Recross-examination:

Q. You say you worked on the barge "Columbia" when she was originally built?
A. Yes, sir.
Q. She was built for a steamer was she not?
A. I believe that was the intention.
Q. It was intended to put machinery on her, was it not?
A. It was; that was what I heard; if they wanted to do so.
Q. Now, don't they build boats that they intend to put machinery on, those under motive power on different lines and sharper forward than they do barges built for such?
A. Yes, about the shape of a steamer.
Q. A boat that is built for a steamer has a sharper bow than a barge?
A. Sometimes it does.
Q. Generally in building a boat it is built to run by its own motive power?
A. In these late days if they want fast boats they build them a little sharper.
Q. Generally, would not a steamer be built with a sharper bow than a barge?
A. If it was very fast it would.

Excused.

Mr. COTTON: I suppose it is the understanding that the cross-libel is withdrawn from the files?
Mr. WOOD: Yes.
Thereupon a recess was taken to 1.30 this afternoon.

521 R. W. BAXTER, a witness called on behalf of petitioners, being duly sworn, testified as follows:

Direct examination.

Questions by Mr. COTTON:

Q. Mr. Baxter, what is your occupation?
A. General superintendent Union Pacific system, Portland.
Q. What road do you have under your charge and direction and control; what does your jurisdiction cover?
A. It covers the Oregon Short Line to Huntington and Spokane and the branches and the water lines.
Q. What do you mean by the water lines?
A. What is known as the O. R. & N. lines leased to the Oregon Short Line Company.
Q. Those are the lines on the Willamette and Columbia rivers?
A. Yes, sir.
Q. For whom were you operating these lines?
A. For the Oregon Short Line.
Q. What connection has the O. R. & N. Short Line with the operation?
A. The Oregon Short Line leased the O. R. & N.

Q. That is their property?
A. Yes, sir.
Q. Has the O. R. & N. anything to do with the operation?
A. No, sir.
Q. Are you a member of the board of directors of the Oregon Short Line & Utah Northern?
A. I am not.
Q. Were you in October, 1892, president, director or secretary?
A. No, sir.

522 Cross-examination.

Questions by Mr. WOOD:

Q. Mr. Baxter, how long have you been in charge of these lines?
A. Something over a year, as general superintendent.
Q. Does not Captain Pegram have immediate charge of the water lines?
A. Yes, sir.
Q. And does not he attend to the entire business of the water lines?
A. Yes, he is known as the superintendent of the water lines.
Q. As a matter of fact, do you interfere with him or exercise any control, or any independent judgment as to the management of the water lines?
A. No, I really know very little about the water lines.
Q. They are left under his control?
A. Largely.

Redirect examination:

Q. Does he consult you about the matter or get directions and orders from you when you give them?
A. In what respect?
Q. In any matter you have authority over him.
A. Yes, sir.
Q. And control his action, if you see fit?
A. Yes, sir.
Q. You report to him?
A. I report to Mr. Dickinson, general manager.
Q. Where?
A. At Omaha.

Excused.

523 B. R. PEGRAM recalled by petitioners.

Questions by Mr. COTTON:

Q. Who had charge and control and management of the repairs on board the "Columbia"?
A. Mr. Carstens.
Q. Who is he?
A. My boss carpenter.

Q. Do you know anything about these specific repairs made on her?

A. No, only as I got the bills; I told him to put her in good order and he did so; he reported that he had.

Q. Did he report to you that she was in good order and condition?

A. Yes, sir.

Q. Fit for service?

A. Yes, sir.

Q. Did anybody tell you what repairs should go on her?

A. No, sir; he told me what he was going to put on her after he had examined her, when she was all right.

Q. Did anybody exercise any authority over your action in regard to the control over him as to what repairs should be made?

A. No, sir; I left it entirely with him.

Q. Now, about the loading of the barge about the 20th or 21st of October. Did anybody tell your office how much load should go on her?

A. I think likely they did, certainly.

Q. Who?

A. I think Balfour, Guthrie & Co.

Mr. WOOD: That is immaterial and incompetent.

Q. Did any one of your superior officers?

A. No, sir.

524 Q. Did anybody order you as to how much load should go on?

A. No, sir.

Q. Any matter of that kind?

A. No, sir.

Q. Did you receive any orders in this regard, in regard to loading 580 tons or more on the barge, from the board of directors or president of the Oregon Railway & Navigation Company?

A. I never heard from them.

Q. What officer of the Short Line Company or the Oregon Railway & Navigation Company has exercised control over these matters?

A. I don't know; I don't know who the officers of the Short Line are, only Mr. Baxter.

Q. I understood you to say that you got no orders from any one, not even from him?

A. No, sir, I got no orders from him.

Q. How long have you been engaged in the boating business?

A. Mostly ever since I was fourteen years old.

Q. On what rivers?

A. The Illinois, Mississippi and Ohio.

Q. You are accustomed to the handling of barges?

A. Yes, sir.

Q. Had you seen the barge "Columbia" often?

A. Yes, sir.

Q. Did you have any opinion about what load she could carry?

A. I thought in good weather, by being careful, probably as much as 800 tons could be put on her. Of course, I would like to have something in the hold if I should put that much on her.

525 Q. From the report which Mr. Carstens made to you of her condition did you think she was a seaworthy vessel, safe to carry 590 tons?

A. I thought so or I would not have put it on her.

Cross-examination.

Questions by Mr. WOOD:

Q. All you know about her seaworthy condition or the exact condition of her repairs is what Mr. Carstens told you?

A. That is all I would really know, although I saw her and inspected her, but not carefully; Mr. Carstens was a kind of subordinate official.

Q. So your opinion is based on what Mr. Carstens told you?

A. Yes, sir.

Q. Did you get any specific orders from Balfour, Guthrie & Co., that they wanted the barge "Columbia"?

A. I could not say about that.

Q. Do you permit your shippers to dictate to you how much your barges shall load?

A. No, sir.

Excused.

S. B. HENDEE recalled by petitioners.

Direct examination.

Questions by Mr. COTTON:

Q. I believe you have testified about some conversation that you had over the telephone, with Balfour, Guthrie & Co., in regard to loading the barge "Columbia," have you not?

A. Yes, sir.

Q. Referring to that time, from whom did you get any orders and directions as to what amount of cargo should be put on that barge?

526 A. If I got any I got them from Captain Pegram; if he was not there I would go ahead and load according to the general reputation of the barge.

Q. Did you get any orders or directions from Mr. Baxter, or the general superintendent's office or from any of the superior officers of the company other than Captain Pegram?

A. No, sir.

Q. Were any of them present at that time?

A. No, sir.

Q. Had you had any orders at any time about the loading of the barge?

A. Nothing special; only just general instructions about loading; that is all.

Q. From whom?
A. Captain Pegram.
Q. That was all, was it?
A. Yes, sir.
Q. No other persons?
A. No, sir.

Excused.

CARSTENS recalled by petitioners.

Direct examination.

Questions by Mr. COTTON:

Q. From whom did you get any orders as to what specific repairs you should make upon the barge "Columbia"?
A. Nothing particular only to repair her.
Q. From whom did you get these orders?
A. From Captain Pegram.
Q. Did he tell you what specific repairs to make?
A. After I examined the barge I told him pretty near what we were going to do with her and he said All right, go to work and fix her.

527 Q. Those were the only orders you received from any person, whatsoever, were they?
A. Yes, sir.

Excused.

GEORGE W. ASPLUND, a witness called on behalf of petitioners, being duly sworn, testified as follows:

Direct examination.

Questions by Mr. COTTON:

Q. Were you ever captain of the barge "Columbia"?
A. Yes, sir.
Q. Do you remember the loads which she carried or took up as lighterage, from the ship "Indiana"?
A. Yes, sir.
Q. Were you captain of her?
A. Yes, sir; there were 614 tons.
Q. What kind of tons?
A. Dead weight, pig iron; all iron mostly.
Q. When was this?
A. In 1891.
Q. Were they long or short tons?
A. Long tons, I believe; all pig iron and nails, kegs and pipes.
Q. Measurements or weight?
A. Weight.
Q. Where did you bring this from?
A. From Astoria up to Portland, from Sutton & Beebe.
Q. How did she come up?
A. All right.

Cross-examination.

Questions by Mr. WOOD:

Q. When were you last master of the "Columbia"?

A. About a year ago, I think, or so, or two years ago; I was master before Ferguson.

528 Q. Did Ferguson relieve you?

A. No, he has been put some other place; they did not need to find me, I suppose, and did not know where I was working at that time; I was working somewhere else.

Q. You were with the company, were you?

A. Yes, sir.

Q. And had some other job?

A. Yes, sir.

Q. What kind of a barge was the "Columbia" as to being cranky or not?

A. She was a good barge as far as I know; I could have put in fifty tons more at that time if they had given it to me.

(Redirect:)

Q. How much more?

A. Fifty tons more easy enough.

Q. How did she tow?

A. All right.

Q. She towed well, did she?

A. Yes, sir.

Q. Do you know anything about steamboating?

A. Yes, sir; I have been steamboating for the last fifteen or sixteen years.

Q. What effect does it have on a barge when she has a list?

Mr. COTTON: I don't think that is proper cross-examination.

Question withdrawn.

A. You don't need to have any list if you lower the barge right.

Q. I did not ask that. I asked what effect it would have on her if she had a list as to steering and carrying capacity?

A. Probably she would steer a little badly if she had a list.

Excused.

529 G. W. LOUNSBERRY recalled by petitioners.

Direct examination.

Questions by Mr. COTTON:

Q. Mr. Lounsberry, what is your occupation?

A. Agent of the Union Pacific Railway Company at Astoria.

Q. The Oregon Short Line & Utah Northern?

A. Lessee, yes, sir.

Q. Were you acting as agent when the barge "Columbia" suffered her wreck?

A. I was.

Q. What time did you come down to the barge?
A. I should judge I got there at half past twelve.
Q. Where was she then?
A. On the inside of the dock.
Q. What time did the collapse occur?
A. The watchman informed me that she struck the dock a quarter to twelve.
Q. I mean when she struck the bottom after that?
A. About two o'clock.
Q. Were you there?
A. I was.
Q. Are you a director, or were you at any time a director, president or secretary of the Oregon Railway & Navigation Co., or of the Oregon Short Line & Utah Northern or either of them?
A. No, sir.
Q. Who else was down at the dock at this time or around the dock?
A. The night watchman, the employees of the "Ocklahama" and the barge "Columbia."
Q. Were any of your superior officers there, Captain Pegram, Mr. Baxter or Mr. Dickenson? Do you know these gentlemen?
A. I do.
530 Q. Were any of them there?
A. No, sir.
Q. Do you know the directors of the Short Line Railway Co., who they are?
A. Not all of them.
Q. Have you heard of any of them being in town or around the neighborhood?
A. No, sir.
Q. You are on the dock there at the arrival of the boats, are you?
A. Yes, sir.
Q. You usually hear those things whenever they occur?
A. I do.
Q. Was there anybody exercising control over the barge or the loading or unloading or moving the cargo, besides the men on the barge and others there present that you mentioned?
A. No one.
Q. In what position was the barge when you first came there; describe the position.
A. She was leaning against the dock with her nose very near up to the roadway with the starboard side against the dock, also fast to the lines; the "Ocklahama" was on the other side of her.
Q. Did you have any conversation with Captain Short or with any of the officers of the barge as to her position, or the way she was lying?
A. I did.
Q. What did they say to you?
A. I asked Captain Short if he considered her in any danger.

He replied that he did not, that she was resting easy in that soft mud and there was no danger.

Q. How long did she stay in that position?

A. As near as I could judge, it was 2 o'clock when she went over, about 2.

531 Q. I mean how long did she stay listed up against the barge; did she change her position?

A. She changed her position afterwards.

Q. Do you know from what cause?

A. I was told——

Mr. COTTON: Never mind what you were told.

Q. Do you know of your own knowledge?

A. No, sir; only from hearsay.

Q. Did you afterwards see her listed in any other way than towards the starboard?

A. Yes, sir.

Q. Which way was she listed?

A. She was on an even keel and then she went over to the port.

Q. How much did she list over to port?

A. When I went into the house she was very near on an even keel; she had not listed but little; and before I got out she was over on her beam ends.

Q. What effect did this listing produce upon her cargo?

A. It caused her to shift.

Q. What do you mean by that?

A. It all took a tumble over like a row of brick to the port, and turned the barge on its beam ends.

Q. What effect did it produce upon the barge?

A. Broke her up.

Q. About what time did this occur?

A. About two o'clock.

Q. And she had been there upon the dock how long?

A. I could not say; I was not there at the time she came.

Q. How long, to your knowledge?

532 A. Since about half past twelve.

(COURT:)

Q. Was the tide in at this time?

A. I could not say, I don't remember.

Q. You don't remember about that?

A. No; I do not.

Q. How did the collapse occur? Did she take any length of time, or how long a time?

A. After she started first?

Q. Yes.

A. She went comparatively quick.

Q. Where did she give way?

A. I should judge in amidships.

Q. Did the house carry off of her?

A. It did.

Q. Did you have any conversation with Captain Short about coming on deck?

A. No, sir.

Q. Did you hear anything said to him about coming on deck?

A. The only thing I heard was when I was in the house and called all hands to come up, just before she went; he hollered to them to come up.

Q. Did the engineer say anything to you about not going down in the hold?

A. He did.

Q. What did he say?

A. It was after the siphon was connected the second time; I was standing on the "Columbia's" bow to see if the siphon was working. The engineer went down; I believe he said the siphon was working badly. He came back and told me he would not go down again, it was not safe. He said he told Captain Short to come up, that it was dangerous, and that Captain Short said there was no danger at all, that he would be through quick and he would then come out.

533 Counsel for libellants objects to what the engineer told the witness he said to Captain Short, as hearsay.

Testimony received subject to the objection.

Q. How long was this before the collision?

A. I could not say. I asked him what the danger was and he said the wheat was falling.

Q. Did you, yourself, see any wheat falling?

A. No, I asked him.

Mr. COTTON: Never mind about the conversation. I will get that from him.

Q. Do you know how long this was before the collapse?

A. I could not tell exactly; five or ten minutes; maybe not over five.

Q. Where was the boat lying with respect to the dock?

A. She was on the inside, upper end, a short distance from the roadway.

Q. How long did the barge lie down in the vicinity of Astoria?

A. You mean before she was moved?

Q. Yes.

A. The last of her was taken out last Sunday, I should judge it was maybe six weeks before that that the balance was taken down to Smith's point.

Q. She had been lying up in what they call Snow bay?

A. Just above the end of the dock.

Q. And the water came up around the barge right after the collapse, that is, the next day, and while she was lying there right next to the dock?

A. It covered the port side, about half of the deck, I should
534 think, as it was lying there at an angle of about 45 degrees.

Q. Was you on the barge when she went over?

A. I was.

Q. Do you know who called to you that she was breaking up or was going over?

A. No, sir; I do not.

Q. You were not on the dock when she came in, were you?

A. No, sir.

Cross-examination.

Questions by Mr. WOOD:

Q. How long were you on the barge before she turned over?

A. I went on her at half past twelve; first I went on and off her several times.

Q. How long had you been on her this last time that you stayed on until she turned over?

A. It is difficult to tell; I was on her back and forth, between her and the "Ocklahama," watching her make the connection.

Q. Connection with what?

A. The siphon.

Q. And how long before she turned over was it that you repaired the damage and made the second connection with the siphon?

A. After they got the second connection?

Q. Yes.

A. They had just got to work; I could not tell you the exact time.

Q. When was it that Smith told you that he would not go down any more, that it was dangerous?

A. That was about five or ten minutes before she turned over.

535 Q. And how was it with reference to this second connection being made?

A. The second connection had just been made before that, and he and I came out on the bow of the "Ocklahama," and we wanted to see how it was working and it was not working satisfactorily and he went down in the hold of the barge to see what was the matter, and he came back and told me that, and I then went into the house to call the men out.

Q. He told you what?

A. He told me that the wheat was falling and that he had told Short it was dangerous and to come out, and Short replied to him that there was no danger, that he would be through quick and he would then come out.

Q. How much of a list did she have at this time?

A. It was very nearly on an even keel then.

Q. And you did not see any of the wheat being shifted by hand, yourself, at all, did you?

A. No, sir.

Q. You say that you saw her first with a list toward the dock; then you saw her on an even keel and then you saw her with a list to port. To the best of your recollection, how long was it that she lay upon an even keel?

A. A very short time.

Q. About how long do you think?
A. I think not over five or ten minutes, I don't know that it was that; it is pretty difficult to remember.
Q. Where was the "Ocklahama" made fast to her?
A. On the side; on the port side of the barge.
Q. How many cables, do you know?
A. I could not tell you; I did not count them.
536 Q. When you first came down there, did you go aboard the barge or aboard the "Ocklahama"?
A. I went aboard the barge.
Q. Who was aboard her then?
A. The master of the barge was there and I was down into the hold and Captain Short was there and I think one or two deck hands; I am not certain.
Q. What was the master of the barge doing there?
A. I don't think he was doing anything particularly, I don't remember.

(COURT:)

Q. The master of the barge?
A. Yes, sir.
Q. Did you go up to get this hose for the siphon?
A. I did.
Q. Was any one with you?
A. Mr. Smith, the chief engineer, went with me.
Q. How long a time were you gone?
A. I should judge a half an hour nearly.
Q. And about what time in the night was it when you got back, to the best of your judgment?
A. I went down there at half past twelve; it was probably between one and half past one.
Q. When you got back with the hose?
A. Yes, sir.
Q. About how long do you think you were trying to fix up this steam siphon?
A. I cannot tell you; I don't remember.
Q. Have you any idea of the length of time that elapsed between the first breaking and the time that you got the repair to the siphon completed?
A. A very short time; it did not work; it simply pulled off the connection; all we had to do was to wire it on again.
537 Q. Why did you not use the pump of the barge?
A. I did not have anything to do with it.
Q. Do you know of your own knowledge?
A. No, I do not.
Q. How many times were you down in the hold of the barge?
A. Twice.
Q. How long after you got there first, was it, when you went down?
A. I went down at once.
Q. How long did you stay down there?

A. I don't know exactly; a few minutes; I stayed long enough to find out what was the matter, what was wanted.

Q. And then I suppose you went after the hose?

A. Yes, sir.

Q. And then how long did you go down again when you came back?

A. No, when I came back Captain Short was on the deck; that was when I asked him if he considered the barge was in any danger.

Q. You state you went down twice? When was the second time?

A. After that first connection blew off, while they were making the second connection.

Q. You went down then, did you?

A. I did.

Q. She was on an even keel then, was she not?

A. No, sir; she was listed toward the dock then.

Q. And when did she take the position of an even keel?

A. While I was on the "Ocklahama" holding the lantern, while they were wiring on the second connection.

538 Redirect examination:

Q. Are there any pontoons lying in front of the dock?

A. Four.

Q. What are they used for?

A. They are made out of four 12 by 12 timbers, used to keep the steamers from lying up against the dock.

Q. How wide are they?

A. Four feet wide.

Q. About how long?

A. I don't know; 30 or 40 feet; maybe longer.

Q. Where do they lie?

A. Along in front of the dock.

Q. How long is the dock at Astoria?

A. About 1,100 feet.

Q. What is its character so far as construction is concerned?

A. Good; first class.

Q. How much cargo have you been in the habit of piling in that space?

A. We keep 50,000 cases of salmon stored in the upper end of it; we had the lighterage of the whole ship stored in the upper end of it ten high.

Q. How high do you pile wheat in her?

A. Generally about six or eight.

Q. Is the wharf solid?

A. Yes, sir.

Q. All along the sides in front?

A. Yes, sir; it has just been repaired and had a new front put in.

Recross-examination:

Q. Where are these pontoons; on the side where the barge was lying?

A. No, sir; on the outside where she struck.

539 Q. What is the length of each pontoon?

A. I say I don't know; I should judge 30 or 40 feet, maybe longer.

Q. How wide did you say they were?

A. Four feet wide.

Q. And are the timbers framed solidly together or is there any space between them?

A. Solid timbers 12 by 12.

Q. So that it would be a solid raft of 12 inches by 4 or 5 feet?

A. Yes, sir.

Q. Floating, of course?

A. Yes, sir.

Q. How was it moored to the dock?

A. With chains.

Q. They are kept there all the time, are they?

A. Yes, sir.

Q. Whose dock is this?

A. I really do not know; it is operated by the Union Pacific system.

Excused.

JOHN F. GRAVES, a witness on behalf of petitioners, being duly sworn, testified as follows:

Direct examination.

Questions by Mr. COTTON:

Q. Mr. Graves, what is your occupation?

A. Night watchman on the Union Pacific dock at Astoria.

Q. Were you at work there in October, 1892?

A. I was.

Q. The night the "Ocklahama" came in with the barge "Columbia"?

A. I was.

540 Q. Were you on the dock at that time?

A. Yes, sir.

Q. Whereabouts?

A. When she struck, you mean?

Q. Near where she struck.

A. I was there when she struck, right there.

Q. What were you there for; what were your duties at the time?

A. It was my duty to take the boat's line.

Q. Do you know what she struck?

A. Yes, sir.

Q. What?

A. She struck the pontoon.

Q. What do you mean by the pontoon; what is it?
A. The fender.
Q. What is its appearance and size and where does it lie?
A. There are four of them lengthwise of the dock, on the outside, about 3½ to 4 feet wide and a foot thick.
Q. About how long?
A. I never measured them; I judge they are about 35 or perhaps 40 feet.
Q. Are they solid or light timbers?
A. Solid, bolted together.
Q. What are they used for?
A. To prevent ocean steamers from landing too close to the dock.
Q. Ocean steamers land there, do they?
A. They do, yes, sir.
Q. Where do these fenders lie; do they lie in the water?
A. Yes, sir; fast to the piles.
Q. On which side of the dock, outside or inside of the dock?
A. On the outside.
541 Q. How did the barge strike this fender, in what direction?
A. At an angle of about 45 degrees, maybe a little more and maybe a little less.
Q. Do you know how long the barge stayed on that side before she was taken behind the dock?
A. No; I could not tell exactly; they concluded she needed beaching and I said I would go after the agent, Mr. Lounsberry.
Q. You don't know how long she stayed there then?
A. No, I know that when I got back she was inside of the dock; it took quite a good while to go up.
Q. What part of the barge struck the pontoon?
A. The stem.
Q. Did it cut into it or what effect did it produce?
A. It bruised it up.
Q. She was coming there to make a landing at that time, was she?
A. Yes, sir.

Cross-examination.

Questions by Mr. WOOD:

Q. How much rise and fall of the tide is there?
A. It varies from five to nine feet.
Q. At that time of year, about how much would there be?
A. The tides are not regular; they vary.
Q. Do you know about what it was that day?
A. No, sir; I do not.
Q. How were those pontoons made fast to the dock?
A. With chains.
Q. In what way are they held?
A. Chained to the piles.

542 Q. Chained around the piles?
A. Yes, sir.
Q. What is the length of the chains?
A. I don't know.
Q. How does the float accommodate itself to the tide?
A. So that these chains will drop down with the tide clear of the piles.
Q. The chains are loose around the piles?
A. Yes, sir.
Q. Did you have any light there?
A. I did.
Q. Did you show the light over the dock so they could see to come in?
A. They could not help seeing it.
Q. I mean, not so they could see your light, but so they could see your dock and the pontoon?
A. I never think of doing anything of that kind.
Q. Did anybody on the bow of the barge or the "Ocklahama," have a light so they could see coming in?
A. That I could not say; there was considerable confusion; she was coming in pretty hard.
Q. If they had had a light out you would have noticed it, wouldn't you?
A. Perhaps I would; it is customary to have a light there when the boats are landing.
Q. It is customary to have a light where?
A. On the bow with a light reflecting.

Questions by Mr. LORD:

Q. You say that the boat was coming in pretty hard. What do you mean by that?
A. Too hard—fast.
Q. How fast did you judge she was coming in?
543 A. That I would not say.
Q. It was coming faster than it ought to have been coming at that distance from the wharf?
A. It ought to have stopped.
Q. If she had not been coming quite as fast as that she would not have collided with the dock, would she?
A. No, sir; if she had been backed strong enough she would not have struck the dock.

Redirect examination:

Q. Did you know where the captain intended to land?
A. It is my business to take the line while he lands.
Q. Do you know where he intended to land?
A. It was the only place he could land coming down that way.

Recross-examination:

Q. Mr. Graves, you said that you saw her strike the pontoon; do you mean that you actually saw her hit the pontoon and saw that that was what did the damage?

A. Yes, sir; I saw it strike the pontoon.

Q. You saw it at the time it struck?

A. Yes, sir.

Q. Were you holding your light over so that you could see, or was the night light enough to see?

A. It was light enough to see that; it might have been the light from the bow of the "Ocklahama," which gave me that light.

544 Q. Then you saw it plainly, did you?

A. Yes, sir; but it was inside; I suppose it was the light from her bow.

Excused.

FRED S. SMITH, a witness called on behalf of petitioners, being duly sworn, testified as follows:

Direct examination.

Questions by Mr. COTTON:

Q. What is your occupation?

A. Marine engineer.

Q. Where were you employed on the 22d of October, 1892?

A. I had charge of the engine of the "Ocklahama."

Q. When she was towing the barge "Columbia"?

A. Yes, sir.

Q. What time did you leave Portland?

A. We left the company's bone yard at 1.40 p. m.

Q. What time did you get down to Astoria?

A. 11.40.

Q. How long were you on watch?

A. I was on watch from half past five until we arrived at Astoria; in fact I was on watch all night.

Q. How did the boat tow?

A. She could not have towed better; she did not have any trouble on my watch.

Q. Did she make any stops on the way down during your watch?

A. No, sir.

Q. How soon did you go on the barge after she struck the dock?

545 A. I had a relief bell, and as soon as I opened my bleeder and regulated my pumps to keep the stem from rising too fast, I went out to the bow, and the foreman told me she had struck the dock.

Mr. COTTON: Just state what you know.

A. I went on the bow of the barge and Captain Short was in the hold, I believe, at the time, and he came up and I asked him what the trouble was; he said that she had sprung a leak. I asked him

what he was going to do; he told me he thought he would take her around inside of the dock and make her fast.

Q. Did you examine the leak yourself?

A. I did, after she went around inside of the dock.

Q. How long after this did they take her around behind the dock?

A. We struck the dock about 11.40 and we went around inside about 12 o'clock.

Q. Where did she lie?

A. When they took her on the inside she lay at the upper end of the dock with her bow about thirty feet from the roadway, head down.

Q. Was she on an even keel or was she listed to either side?

A. She was listed to starboard, against the dock.

Q. Against the dock?

A. Yes, sir.

Q. Did you go down and examine the leak?

A. Yes, sir.

Q. Where was the water running from the leak?

A. When I went down the water was running over the bulkhead that Captain Short had built.

Q. How large was this bulkhead?

A. I should judge it was maybe 3 or 4 feet in length, 3 feet, and 2 feet high, right in the bow.

546 Q. Where did the water run from there?

A. It was running over the top.

Q. Where did it go to?

A. It distributed itself all over the boat.

Q. How deep was the water right near the main hatch?

A. I should judge from 14 to 16 inches; that was right under the center keelson; there was no water out say three feet from the keelson, no water at all; she was very sharp in there.

(COURT:)

Q. You say there was no water around from the center keelson?

A. No, sir; not to amount to anything.

Q. Where did the siphon pump touch the water?

A. Right after the hatch.

Q. On which side?

A. Just about the center of the boat; it was on the port side of the keelson.

Q. The port side of the keelson?

A. Yes, sir.

Q. That is the main midship keelson?

A. The main keelson.

Q. How long did the boat stay in that position, listed toward the dock?

A. I think it was 1.30 when she listed to port; about that time.

Q. How much did she list to port?

A. At the time she took her port list it was not very great, but as

the tide fell—the tide was running out then—and as the tide fell she kept going over more and more; she was on bottom then.

(COURT:)

Q. The receding of the tide caused that?

547 A. Yes, sir; after the guard got away from the dock—I think it was high water when we got down there, as soon as the guard got away from the dock she kept going off more and more; that is, the water went out, if the water had remained that high, the barge would never have turned over.

Q. Where did she finally end up, that is, with the list? How much was she listed, that is, before she collapsed I mean?

A. Her guard at the siphon was about 25 feet from the house, from the forward end of the house, and the last I saw of the siphon it was under water; I was leaning over the guard looking to see how it was flowing, and then the guard, I should judge, was maybe 8 or 10 inches from the water; maybe a foot.

Q. What effect did this listing have on her cargo, if any?

A. It threw the full weight of the cargo against the side of the house, the port side.

Q. Did it have any tendency to shift, or not?

A. Yes; two sacks fell on me when I was down connecting my hose, and when I went down looking at the siphon the side of the house was all bulged out and the seams were open and the wheat was running out.

Q. When was this that you went down to look at the siphon?

A. I went down just after she blew the coupling off.

Q. Do you know how long this was before the collapse?

A. About half an hour.

Q. Did you fix up the siphon?

A. Yes, sir.

Q. How many times did you see Captain Short?

548 A. I saw Captain Short in the hold twice, and I saw him in the engine-room once.

Q. Did you say anything to him about coming on deck?

A. I did.

Q. What and why?

A. When I went in the hold after the coupling had blown off—I went down to see what the cause was, and to see if the obstruction was all clear—I told Short then the barge had a list to port. I said, "The best thing that you can do is to come out; this barge can't stand here; there is nothing to support it." "Oh," he says, "there is no danger at all." He says, "I have seen boats in a worse fix than this." I said, "If I were you I would come out; I am not going to stay here any longer." So I went out, and the next time I spoke to Captain Short—I did not go in the hold to speak to him this time; I stood in the hatch where I was working; I was coupling up the siphon the second time, and my foreman was with me, and two sacks of wheat fell on us; the barge was listed considerable then, and I hollered to Short; I said, "Captain, you had better come out right away; the wheat is falling down and the boat will

soon overturn." He said, "I will be up in a few minutes; I will soon be through here." I went out.

Q. About how long were these conversations before the collapse occurred?

A. That was about half an hour.

Q. The second conversation, how long was that before?

A. That was when I was coupling the siphon up; it was
549 just half an hour, because after I got the siphon connected it ran about 20 minutes and the barge went over.

(COURT:)

Q. This was about half an hour before the barge went over that you called to him the last time?

A. Yes, sir.

(COURT:)

Q. Where was Peterson at this time?

A. I don't know; I did not see Peterson at all; there was somebody in the hold with Captain Short when I went down, but I do not remember who it was; I did not pay any attention at all.

Q. What was the appearance of the cargo in the barge as she lay there at the time you were fixing your siphon; just describe that?

A. The appearance of the cargo?

Q. Yes; state what made you think it was dangerous; describe the character of it.

The COURT: He has stated that two sacks of wheat fell on him and that he saw the sides of the house bulged out, etc.

Q. How quickly did the barge collapse?

A. When it started I hollered again to Captain Short, when I felt it going; I hollered to Captain Short to come quick, and then I jumped over on the boat and ran to the engine-room for an ax and I wanted to cut my steam hose so it would not scald anybody, and I hollered to my foreman to close it up. I had a man on top of the boiler all of the time. He closed the boiler; my second held the hose against the stanchion, and I tried to cut it and I could not do it; I was afraid it would pull my pipes off the boiler. So she
550 went very gradually; she was crushing when I came back to the engine-room to cut the hose; the house went first.

Q. What kind of a house was this?

A. It was a very light cedar house.

Q. Did it break the hog post?

A. Yes, sir.

Cross-examination.

Questions by Mr. WOOD:

Q. Mr. Smith, when you say you saw the sides bulge out and the wheat running out from the cracks, about how far was the guard from the water at that time?

A. I should judge about a foot.

Q. You have stated that she was on the bottom at the time she took the port list; how do you know that she was on the bottom?

A. For the simple reason that she went over so quickly.

Q. That is, took the port list so quickly?

A. Yes, sir.

Q. How much draft did she have coming down, if you know?

A. I do not know.

Q. When you went down to see about the end of the siphon, was that before or after the time that it blew off and you fixed it?

A. That was after.

Q. That was after you had fixed it the second time?

A. That was just after it blew off the first time.

Q. Then you wired it on again?

A. I wired it on again.

Q. Then you went down and still it was not working satisfactorily?

551 A. No, I did not go into the barge—I went into the barge, but not into the hold.

Q. You did not then, go down to the end of the siphon?

A. No, not after I wired it, but the second time I did not go down; I went on top of the wheat and called down in the hatch but not in the hold of the barge.

Q. But you were down at the end of the siphon once?

A. Yes.

Q. When was that?

A. Right after it rolled off the first time.

Q. But not after you repaired it?

A. No, sir; not after I repaired it.

Q. Why did you not use the pump of the barge?

A. They had no steam pump; the siphon was the only thing that ran by steam; the pump they had there is a hand pump.

Q. Did they make any effort to use it?

A. Did I make any effort?

Q. No, did anybody that you know of make any effort?

A. Not that I know of.

Q. You don't know whether it was tried or not?

A. I know it had been worked; at least, so the captain of the barge told me; I never saw it myself.

Q. You say that the siphon touched the bottom of the boat just aft the hatch, if I understood you correctly. Which hatch was that?

A. It was the hatch just inside of the house; I should judge about 25 feet.

Q. About how would it be as to amidships?

A. It was forward of amidships.

552 Q. It was forward of amidships?

A. Yes, sir.

Q. It was the main hatch, the only hatch she had?

A. I think it was the main hatch; it was the only one I saw.

Questions by Mr. WATSON:

Q. You say that your foreman was present when you had these conversations with Captain Short?

A. Yes, sir.

Q. What is his name?

A. Pat. Barry; he was not present when I had the conversation with Short; he was present when I hollered to Short to come on.

Q. You say that you first told Short he had better come out of there about a half an hour before the boat collapsed; that is, the second time you told him?

A. Yes, the second time it was about a half an hour.

Q. A half an hour?

A. Yes.

Q. Then you did not go down into the hold after that?

A. No, I did not go in the hold; I went in the barge.

Q. You did not say anything to Short after that until just before she went over?

A. About five minutes before she went down I hollered to him.

Q. Did Short answer when you hollered to him?

A. I don't know; everybody was hollering then.

Q. The boat went over though, almost immediately after you hollered the last time that she was going?

553 A. If they had started they had plenty of time to get out; plenty of time.

Q. What caused you to holler the last time; what peculiar indication of the boat?

A. The house cracking.

Q. That you could hear because you were right at the house?

A. Yes, sir; he could not hear it below.

Q. He could not hear that down below; there was nothing to indicate to Short and Peterson that there was anything unusual except your hollering to them, that you know was there, that you know of?

A. No, not that I know of.

Q. At the time you hollered you say there were a great many other people hollering—a general confusion?

A. Yes, sir; Mr. Lounsberry had gone inside of the house to get Captain Short and Peterson out, to tell them to come out, at my request.

Q. That was after you hollered?

A. No, he went in there before I hollered.

Q. It all occurred, though, about the same time, that is, substantially, didn't it?

A. Yes; I believe Mr. Lounsberry might possibly have been into the hatch when I hollered to Short to come out.

Questions by Mr. WOOD resumed:

Q. How long was the barge on an even keel after she went from the starboard list to the port list, I mean in that interval, how long was she on an even keel?

554 A. I could not say, really; I was inside working on the hose. I came out and she was listed to the dock, and I went in again for wires or something, and came out, and she was listed to port; she could not have been on an even keel more than five or ten minutes at the most.

Q. How long was this point of time, did you say, when you went in to get the wire; she was on an even keel until the time of the final collapse?

A. She collapsed at 3 o'clock.

Q. How long do you think it was?

A. About an hour and a half.

(COURT:)

Q. Do you know how this barge came to strike the pontoon so hard?

A. No, sir; I do not; we were running at our usual gait, and we stopped well away from the dock?

(COURT:)

Q. You say you stopped well away from the dock?

A. Yes, sir; we stopped—I think the bow of the boat or barge must have been abreast of the upper deck, and that was against the high water, too; that is plenty of time; I don't know how she struck.

Q. You say that is plenty of time?

A. You mean for the "Ocklahama"?

Q. Plenty of time to stop both, in your opinion?

A. Yes, sir.

Q. Isn't it more difficult to manage a boat with a tow than without?

A. Certainly we require more time to stop; if we go down with a light boat, maybe we would not stop until within two boat-lengths from our landing.

Questions by Mr. WATSON:

555 Q. Was not your foreman Barry down in the hold just about the time that the boat went over; did not Barry barely get out of the hold?

A. Down in the hold of the barge?

Q. Yes.

A. Not to my knowledge.

Q. You don't know whether he was or not?

A. He was standing at the siphon, standing at the pipe that the hose connected onto; that was right through the deck, and that was where Mr. Barry and I were working.

Q. At the time she went over?

(No answer.)

(Mr. WOOD:)

Q. How long had you been on the "Ocklahama," Mr. Smith?

A. Two years.

Q. Do you know where Mr. Boyce was at the time the boat went over?

A. No, sir; I do not.

Q. Is it not a fact that Mr. Boyce and Mr. Barry were both down in the hold just prior to that time?

A. Mr. Barry possibly was down on the deck between the sacks, but he was not in the hold, for the simple reason that he had no business there.

Q. But you don't know whether he was down there or not?

A. He is not a man that would go down there unless he was sent.

Redirect examination:

Q. You say you had stopped your engines before you had gotten how far away from this place?

A. We were abreast of the upper end of the dock.

Q. How long had you been with Captain Short?

A. On the "Ocklahama"?

Q. As engineer at various times?

556 A. I had been on the "Ocklahama," I think it is only about six weeks.

Q. Had you been with him before this?

A. I had run on the Cascade route with Mr. Short, and on the Willamette river with Mr. Short.

Q. Had you been with him before he had taken charge of the "Ocklahama"?

A. Yes, sir.

Q. Was Captain Short a skillful man in handling boats?

A. Mr. Short was as good as the average; he was a very careful man.

Recross-examination:

Q. He had not handled tows, though, on these other routes that you speak of?

A. No; but I believe Captain Short has towed boats in his life.

Q. You are to state here what you know positively. How many tows had you handled with Captain Short during this six weeks' service that you speak of?

A. I could not say; I have not the least idea.

Q. Do you remember having had any night runs with tows?

A. No, I don't remember; I never paid much attention to it; we were running night and day at that time, but I could not name any particular tow.

Q. In towing ships, they are managed by the pilots and not by the captain of the towboat, are they not?

A. Yes, sir; they are managed by the pilot; the captain of the towboat has nothing whatever to do with it.

557 Questions by Mr. COTTON:

Q. How much water was coming in this hole, do you know?

A. When I went down he had the bulkhead pretty well built up, and the water that was coming along the top of the bulkhead did not amount to but little.

Q. Could you have kept the water out with a pump, kept her afloat?

A. Yes; without any trouble at all.

Q. What kind of a pump?

A. I could have kept it out of her with the 2-inch siphon, that I had, very easily.

Q. As soon as you got the siphon working?

A. Yes, sir.

Q. What is a steam siphon?

A. It is just a combination of iron pipes.

Q. Was the stuff on board the barge for the siphon?

A. The siphon was already connected with the hose, ready to put the hose on to.

Q. All rigged?

A. All rigged; yes, sir.

Q. How does it work; describe how it works?

(COURT:)

Q. If the siphon was already on, rigged, what was the occasion for you and Mr. Lounsberry to go uptown to get something?

A. We had to get connection with our boiler and the siphon.

Q. Describe the siphon; what is it?

A. I made the siphon myself. It is a 2-inch "T." I can draw it better on a piece of paper than I can explain it.

558 Q. Just explain to us generally?

A. It is really nothing but a "T" put on in that shape (indicating). Suppose my hand is the "T;" the piece of pipe running down here (indicating) is the suction; the steam pipe comes down in this end of the "T;" the rubber runs half way past the opening and the discharge pipe runs on in that direction (indicating), in either direction you wish.

Q. How do you start it going?

A. Turn on your steam and it throws the water out.

Q. It is like one of the atomizers?

A. Yes, sir; it draws the water up and forces it out.

Q. You bring a strong current of steam across an opening connected with the water which pushes the water our?

A. Yes, sir.

Q. That is the part that you rigged so as to connect your steam hose?

A. Yes, sir.

Q. To connect the engine of the "Ocklahama" with the siphon.

A. Yes, sir.

Q. You say you put this siphon on?

A. Yes, sir.

Q. When?

A. It must have been four or five years ago; I put a siphon in all of the company's barges; I was working in the bone yard at the time.

Q. What other kind of pump did this barge have?

A. She had one of these box pumps, I believe, hand pumps.

Q. Do you use those pumps on barges and boats?

A. Always; yes, sir.

559 Recross-examination:

Q. What was the capacity of this hand pump?

A. I could not say.

Q. How did it compare with the capacity of your siphon?

A. When in good working order the flow was not much.

Q. Why didn't you use it?

A. I don't know, I had nothing at all to do with it.

Q. Who ordered you to fix the siphon?

A. No one; I fixed it on my own account.

Q. What did you expect to accomplish by the siphon?

A. I expected to get the barge clear.

Q. Do you think if your siphon had got to work promptly that it would have helped the barge any?

A. No, not after she was on the bottom.

(Redirect:)

Q. What do you mean by on the bottom, after she had the list?

A. After she took the list nothing would have saved her from going.

Excused.

JOHN FERGUSON recalled by petitioners.

Direct examination.

Questions by Mr. COTTON:

Q. What was the appearance of the barge before she collapsed and where did she break?

A. She was lying; she broke up right amidships; that was just immediately before she broke up.

Q. She was lying in what direction?

560 A. With a list to port.

Q. How much of a list did she have?

A. She was listed so that her guard was about a foot out of the water.

Q. What part of her broke; how did she break?

A. She was lying on her bilge that way (indicating), and the weight of the wheat took the hog post out and the whole thing collapsed.

Q. Where were you standing?

A. When she collapsed I had got out onto the dock.

Cross-examination.

Questions by Mr. WOOD:

Q. What gave her this list to port?
A. The tide going away from her.
Q. How long had she had that before she broke up?
A. About an hour; a little over an hour; an hour and a quarter.
Q. Had she had the same amount of list all of the time?
A. No, sir.
Q. When was she last on an even keel?
A. About an hour and a half before she broke up.
Q. And when did you say she first took the port list?
A. About an hour and a quarter before she broke up.
Q. What brought her on an even keel?
A. I shifted some wheat from starboard.
Q. How much wheat did you shift?
A. About twenty sacks.
561 Q. How much of a list did she have to starboard when you began shifting?
A. She had not much of a list to starboard.
Q. You stopped shifting when you brought her on an even keel?
A. Yes, sir.

Excused.

It is admitted that the last witnesses examined are not officers or directors of the companies, the petitioners herein.

EDWARD TACKABERRY recalled by petitioners.

Direct examination.

Questions by Mr. COTTON:

Q. Did you hear Mr. Smith say to Mr. Lounsberry that he would not go down in the hold?
A. No, sir; I did not.
Q. Didn't you so swear before the coroner's inquest?
A. I don't remember, I don't think I did.
Q. Didn't you swear to that effect?
A. Hear the engineer tell Mr. Lounsberry that he would not go down?
Q. Yes; that he thought it was dangerous?
A. Possibly I did; it has been some time ago.
Q. Didn't you swear this: "Until the barge turned over it was fully five minutes until the engineer notified Mr. Lounsberry that he would not go into her hold until she keeled over"?
A. He would not go into the hold?
Q. Yes; until she keeled over; didn't you swear to that at the coroner's inquest?
562 A. I might have sworn to that; yes, sir.
Q. Is not that the fact?

A. I would not swear positively; it has been a year ago; I don't remember about it.

Excused.

WILLIAM MANN, a witness called on behalf of petitioners, being duly sworn, testified as follows:

Direct examination.

Questions by Mr. COTTON:

Q. Were you a deck hand on the "Ocklahama" at the time of the collapse?

A. Yes, sir.

Q. Had you ever worked on the barge "Columbia"?

A. Many times.

Q. Did you ever work for George Asplund?

A. Yes; several times.

Q. Do you remember bringing up the load from the "Indiana"?

A. I remember the circumstance, but I did not come up with her; I was up loading her at Astoria.

Q. Do you know what amount of cargo she brought up?

A. I understood over 600 tons, but how much I could not say.

Q. Did you assist to shift the wheat on the barge "Columbia" at the time she had a list to the dock?

A. Yes, sir.

Q. Who helped you?

A. Captain Ferguson and his watchman were there, myself and Boyce.

Q. Boyce was there?

563 A. Yes, sir; we were sent in there; I was on the "Ocklahama," and the mate, Tackaberry, said Go over and give the captain a hand and shift the wheat over.

Q. How much wheat did you shift?

A. I don't know; I think probably we shifted some eight or ten truck-loads; trucked it over.

Q. Put them over on one side?

A. Put them over on one side.

Q. How did that bring the barge?

A. It straightened her up.

Q. How long after this did she take a list to port?

A. We stood talking there for probably four or five minutes; I don't know; finally she started to go over to port.

Q. What was the appearance of the house before she collapsed?

A. I don't know; I suppose it was all right.

Q. What effect did this listing have; did she finally list well over to port or did she not?

A. Yes; she gradually got a little worse all the time; when she started she kept settling more and more.

Q. Where did she finally fetch up?

A. She stayed in that position quite a long time—that is, over on the port side, before she broke up.

Q. Was she constantly in the same position or was she changing?

A. No; she was right steady. I can explain to you: After she took the list to port she just went down so far and appeared to stay there; went no further until she turned over altogether.

564 Q. Then how did she go?

A. The wheat seemed to slide and took the house with it.

Q. What effect did it have on the barge?

A. It had no effect; the hog chains were all collapsed and drawn to the starboard side of the house; the wheat quashed down the whole business.

Q. It broke the barge, did it?

A. I don't know what effect it had on the barge, the whole business slid.

Q. Had she been on the bottom some time before this?

A. She must have been on the bottom.

Q. For how long?

A. I don't know; for some time. The tide went out. We were in there about high water, I think; as the tide went out it was shallow water there and left the barge on the bottom.

Q. How long do you think she was on the bottom before the collapse?

A. It must have been some time; I could not really say the time; we were all doing one thing and another; time flies, you could not tell the difference between half an hour and ten or fifteen minutes, sometimes.

Q. Did the house go suddenly?

A. Not to say like a shot out of a gun. I was on the bow of the barge at the time it went over, and the house was cracking and smashing, and it went like a landslide; it did not all go in a lump, but it slipped right on over.

565 Cross-examination.

Questions by Mr. WOOD:

Q. Where were you at the time the barge collapsed?

A. I was on the bow of the barge.

Q. How long had you been in that position?

A. I had been on the bow of the barge some few minutes.

Q. Did you make any examination by sounding, or anything of that kind, to find out whether the barge was on the bottom?

A. I did not.

Q. But when you say that it was at the bottom, that is simply your guess?

The COURT: That is what he said. He said that she must have been on the bottom.

Questions by Mr. LORD:

Q. At the time that the barge went over or started to go over, how many lines were there attached to the tug "Ocklahama"?

A. I think the towline and spring; I think that was still there, and head line, of course; but as to the number, I can't remember.

Q. About four lines that you remember?

A. Yes.

Q. Was she lashed closely to the side of the tug or was there some slack on the line?

A. There must have been some slack after we dumped her.

Q. When she started to go over, would the lines have prevented her from going over, or if she had gone over and the lines had not been touched, would it have pulled the "Ocklahama" under?

566 A. The whole business went, and if the lines had not been cut away it would not have had any effect upon the wreck.

Q. It would not have had any effect upon the wreck?

A. No, sir.

Q. It would have gone over just the same if they had left the lines there?

A. If she had gone over.

Excused.

JOHN FERGUSON recalled by petitioners.

Direct examination.

Questions by Mr. COTTON:

Q. Mr. Ferguson, when the barge "Columbia" first left Portland, which way was she listed?

A. She was listed to starboard; she was listed away from the towboat.

Q. She was listed away from the towboat?

A. Yes, sir.

Q. Did you straighten her up?

A. We tried to.

Q. How did you get her?

A. I shifted about thirty or forty sacks of wheat and she would not come up right, and I went down into her. I thought the amount of wheat shifted from one side to the other ought to have straightened her, and I went down and shortened up the towline, the "Ocklahama" being about two feet higher than the guard of the barge. The shortening of the towline brought the barge's guard-line up with the "Ocklahama" and listed her that way, shifted all the wheat in the barge, I could not straighten her up. I told Captain Short about it. He stopped the "Ocklahama"

567 about St. John's and lengthened out the towline and then she listed toward the towboat and I put the wheat back where I got it from and she was on a level keel, as she was when she left.

Q. Did you have any difficulty with her after that?

A. No.

Q. How long did it take you to load this barge?

A. From half past seven to five in the evening with an hour off in the middle of the day.

(COURT:)

Q. Was there any water in the hold of the barge as you were going down?

A. We pumped the barge out dry.

(COURT:)

Q. That was all the water there was?

A. Yes, sir; the barge was tight, in good condition.

Q. When did you pump her out?

A. After we left the bone yard we pumped all that was in her out in about ten minutes.

Q. When did you examine her again as to water?

A. Just before we got to Astoria.

(COURT:)

Q. How was she then about the water?

A. Just the same; she had not made any water.

Q. Was your hand pump in good order?

A. It was in good order; yes, sir.

Cross-examination.

Questions by Mr. WOOD:

Q. Why did you not use your hand pump?

A. We did use it.

Q. When she went behind the dock?

A. Yes, sir.

Q. How long a time did you use it?

A. Until the engineer started to connect the siphon.

568 Q. Did you pump the barge dry?

A. No, sir.

Q. Did your pump cease to suck?

A. No, sir.

Q. Why did you stop pumping?

A. To allow the engineer to connect the siphon, it was connected right alongside of the siphon and we could not work the pump very well while he was connecting the siphon.

Q. You could not work both?

A. Not until after he got the siphon connected; after that we could work both.

Excused.

It is admitted that Walter J. Burns is the agent of the insurance company, is residing at Portland and has been for some years.

Mr. COTTON: I desire to show by Mr. Burns when he got this insurance. It is a little doubtful in the record.

It is consented that the testimony of Mr. Burns in regard to the time when he received money on the insurance for the cargo lost on the "Columbia," may be taken and incorporated in the record.

Petitioners rest.

*Rebuttal.*

EDWARD TACKABERRY recalled on behalf of respondents in rebuttal.

Direct examination.

Questions by Mr. WOOD:

Q. Did you see the method by which the barge was made fast to the "Ocklahama," as she started down the river?

A. Yes, sir.

569 Q. Did that have anything to do with her listing?

A. It may possibly, a right short line like that.

Q. After that was corrected, did the barge seem to do any better in the way of riding on an even keel or was the wheat shifted again?

A. I believe it was shifted after that.

Cross-examination.

Questions by Mr. COTTON:

Q. How did she ride after the wheat was shifted?

A. There was quite a list all the way down the river; a little list.

Q. You are sure about that, are you?

A. Yes, sir.

Q. When you were down to Astoria, you advised the captain of the barge, when she was keeled over to starboard, to put out plenty of line and let her lie that way, did you not?

A. I made that remark; yes, sir.

Q. You have been a mate here on the river for some time and you are an experienced man?

A. I have been a few years.

Respondents' counsel objects.

Objection withdrawn.

Q. Why did you tell him that?

A. I thought lying up against the dock the way she was, with plenty of line, would perhaps hold her in position.

(COURT:)

Q. She was lying on the bottom?

A. Supposed to be at that time; yes, sir.

Excused.

570 WILLIAM BOYCE recalled on behalf of respondents in rebuttal.

Direct examination.

Questions by Mr. WOOD:

Q. Mr. Boyce, do you remember when the towlines between the barge and the "Ocklahama" were lengthened on the way down the river?

A. Yes, sir; it was my watch on deck; I did it all.
Q. Did the barge ride any better after that?
A. No, sir.
Q. Did they have to shift the wheat more than once after that?
A. Yes, sir.
Q. Did the barge "Columbia" go down the river on an even keel?
A. No, sir; her guard touched the water at the mouth of the Willamette.

Cross-examination.

Questions by Mr. COTTON:

Q. When did your watch end?
A. My watch ended at supper time; that was about 5 o'clock.
Q. Then you don't know anything about her after 5 o'clock, do you?
A. Yes, I sat at the gangway looking at her all the way down until it was pretty late.

Mr. COTTON: I don't know what part of this case this testimony is given to support.
The COURT: I don't think this is proper rebuttal. The witness testified to all these facts before.

Excused.

571 JOHN WHITTLE, a witness called on behalf of respondents in rebuttal, being duly sworn, testified as follows:

Direct examination.

Questions by Mr. WOOD:

Q. Did you examine the wreck of the barge "Columbia" lying at Smith's point?
A. Yes, sir.
Q. When?
A. Yesterday.
Q. Did you examine the wreck of her bottom and frame ribs?
A. Yes, sir; I looked all around.
Q. What is your business?
A. My business is carpenter.
Q. How long have you been engaged in that business?
A. Forty years.
Q. Do you know sound wood from rotten wood?
A. I think I ought to.
Q. Did you find in the frame among the remnants of the wreck there at Smith's point, any rotten wood?
A. Plenty of it.
Q. Have you got any specimens?
A. I brought one, yes, sir.
Mr. WOOD: I wish you would get it. (Witness produces piece of wood.) State where you got that from.

A. From one of the bottom timbers of the barge; that was the bottom part of it.
Q. Was there any more like it there?
A. Yes, sir.

Counsel for respondents objects.

Q. How are the ribs; did you find any of the ribs there?

572 Mr. Cotton objects.

A. Some of the ribs are very soft.

Counsel for respondents moves to strike out the answer.
Testimony received subject to the objection.
Counsel for libellants offers the piece of wood referred to in evidence, and the same is received and marked "John Whittle Exhibit A."

Cross-examination.

Questions by Mr. COTTON:

Q. I suppose you took out a piece that would be a good sample of the rotton wood, didn't you?
A. I broke it off of one end of the timbers that went across the bottom of it.
Q. Across the bottom of it?
A. That was one of the bottom timbers.
Q. One of the floor boards?
A. Yes, sir; the under timbers were nailed up to that.
Q. And this is a sample of the rotton floor boards that you found there?
A. Yes, sir; the plank that dropped loose from it and I just pulled that piece off.

Redirect examination:

Q. What were these fastened to; what part of the frame of the boat was it fastened to?
A. The plank had dropped away from it and I took a rock and knocked it down and it dropped off.

573 Recross-examination:

Q. Where do you live?
A. I live in North Portland.
Q. How do you know this was the barge "Columbia"?
A. I have seen her very often on the river here but I never saw her after she was sunk until yesterday.
Q. To what was this piece fastened when you got it?
A. It was not bolted to anything; it was sticking right underneath one of the bottom timbers.
Q. Sticking underneath one of the bottom timbers?
A. Yes, sir; and I struck it with a rock.

Redirect examination:

Q. Who told you that this was a portion of the wreck of the barge "Columbia"?

Objected to. Objection overruled.

A. The man that was there; he said he brought up a lot of timbers and brought it up there.

Q. Do you know his name?

A. I did not ask him his name.

Q. Was there any other man there?

A. No, sir.

Excused.

Respondents rest.

Now, at this 28th day of January, 1893, by agreement of the parties to take testimony and to perpetuate the same in all actions and suits wherein the said parties are interested and the facts
574 hereinafter shown are made relevant, subject to all legal objections at the trial of such suit or action; and service of order and notice of examination being hereby expressly waived. The parties hereto, The Oregon Short Line & Utah and Northern Railroad Co., appearing by W. W. Cotton, its attorneys, and The Oregon Railway and Navigation Co., by —— ——, its attorneys; and William Boyce, appearing in person and by his attorney, Chas. F. Lord, whereupon the following proceedings were had, to wit:

Dr. G. B. YOUNG, being called as a witness in behalf of William Boyce, being duly sworn, testifies as follows:

Q. Are you acquainted with William Boyce?

A. Yes.

Q. Please state the circumstances under which you became acquainted with him.

A. He came under my care as a patient in the Marine Hospital Service.

Q. What official position do you occupy, Doctor?

A. I am assistant surgeon of the United States Marine Hospital Service, and am in charge of the service at this port.

Q. State what Mr. Boyce's condition was when you first met him.

A. He applied for admission to the care of the service with an injured arm. The right arm was immensely swollen, very hot, felt very hot, the skin very glossy and red and œdematous, pitting on pressure from the shoulder to back of hand. This was in the forenoon of October 23d, 1892. The arm was, the forearm and
575 arm were in their normal position, the motions of flexion and extension were no more limited than the amount of swelling present would account for. There was great tension and swelling and no crepitus could be elicited by any amount of motion possible under the swollen condition of the tissues. Directly over the olecranon covering an area of about the size of a quarter there was seemingly fluctuation present.

Q. State your diagnosis of the case made at that time.
A. I made no diagnosis on preliminary examination.
Q. State when you did and when it was?
A. I made a diagnosis about an hour later.
Q. State the result of it.
A. I made a diagnosis of the fracture of the olecranon.
Q. Where was the break?
A. The break was squarely across the olecranon about a quarter of an inch from the tip. Possibly a little more.
Q. State whether or not such a break is easily healed.

Objected to on the ground of incompetency.
Question withdrawn.

Q. For how long a time after this did you attend him, and how often?
A. Up to December 27th with the exception of three weeks in November, from the 2d to the 22d inclusive. During which time I was on leave and he was under the care of Assistant Surgeon C. H. Gardiner, of the Marine Hospital Service. During the time he was under my care I saw him every day.
576 Q. Please state the effect of such a break.
A. The general effect is either to impair or destroy the ability to extend the forearm or carry a weight in the hand.
Q. Why does this affect the arm in that way?
A. Because the muscle which extends which is principally concerned in extending the forearm is inserted into the tip and sides of the olecranon, and when the olecranon is broken the contraction of the muscle separates the fragments without producing affect on the motion of the forearm.

Cross-examination.

By Mr. COTTON:

Q. When did you first see Mr. Boyce, Doctor?
A. In the forenoon of October 23d, 1892.
Q. Whereabouts?
A. At the St. Vincent hospital in Portland.
Q. Do you know whether he presented himself for medical treatment to others before this?
A. I do not know.
Q. Do you know whether that was the first treatment he had had at the hospital?
A. I don't know.
Q. Where did you attend him, at the hospital?
A. In the Marine Hospital ward at St. Vincent's hospital.
Q. Was he confined to his bed?
A. He was confined to his bed up to the time that I was relieved by Assistant Surgeon Gardiner. Upon my return to duty I found him up.

577 Q. What was the reason of this confinement, Doctor?

A. The great swelling of his arm and forearm made any position except a recumbent one exceedingly painful.

Q. Besides this condition of his arm did you note any other signs of injury?

A. There were several excoriations, on the back of the arm and forearm.

Q. Then as I understand it, all the injuries were confined to this arm and forearm?

A. Yes.

A. And that was the case all the way through until the time when he was discharged?

A. Yes.

Q. This condition of the arm which you described as to swelling, redness and glossy appearance of the skin, is that the result of a fracture of this kind?

A. Not necessarily so.

Q. What peculiarity in this case produced it?

A. As far as absolute knowledge is concerned I have none. In my opinion it must have been produced by an unusual amount of contusion and injury to the arm and forearm as a whole.

Q. How long did this appearance which you first described continue, and describe its disappearance, if it did disappear?

A. This swelling showed a very remarkable indisposition to yield to treatment, and while the pain was very much abated if not all removed, at the time of my relief by Assistant Surgeon Gardiner, the swelling persisted to very considerable extent.

578 Q. Why was that patient discharged, Doctor?

A. Because his arm had progressed as far towards recovery as was any prospects of its doing, for many months, or possibly ever, and there is no provision by the service for very prolonged or permanent care of injured.

Q. Did he need further hospital treatment at the time he was discharged?

A. No; at least no treatment that could not be administered to him as an out patient.

Q. What treatment did he need after being discharged?

A. A gentle and continuous motion of the joint.

Q. What do you mean by motion in this sense?

A. I mean use by means of gentle exercise, or by what is known as passive motion.

Q. This olecranon, Doctor, as I understand it, is the prominent bone at the elbow, is it not, at the bend of the elbow?

A. Yes, sir.

Q. This effect of the movement of the arm in pulling the fractured portions apart in a break of this kind ceases, does it not when the fracture is healed?

A. If the healing is perfect it does.

Q. The condition which you described and its effects exists then as long as the fracture continues?

A. The partial or complete inability to extend the forearm or

carry a weight in the hand does persist as long as the fracture remains ununited, that is completely ununited.

Q. What is the present state of this Boyce's arm?

579 A. There is moderately firm ligamentous union with considerable separation of the fragments on extreme flexion and an inability to extend strongly or flex completely the forearm.

Q. What about this power to sustain weight in his hand?

A. I should judge it to be considerably weakened. I know nothing from my personal knowledge.

Redirect examination:

Q. How long did it take for the fracture to heal and unite?

A. Approximately it was about the middle of December, 1892, before he was allowed to use his arm.

Q. Would there be a chronic weakness of the arm even after its union?

A. If the union was a perfect osseous union there would be no weakness, provided the joint action was not interfered with by the formation of a callous. In this case the union is ligamentous and there seems to be some involvement of the joint probably caused by adhesion.

G. B. YOUNG,
*Ass't Surgeon, U. S. Marine Hospital Service.*

STATE OF OREGON, } ss:
*County of Multnomah,* }

I, Geo. E. Davis, hereby certify that the foregoing deposition of Dr. G. B. Young was taken before me at the office of said Dr. Young, in the city of Portland, Oregon, between the hours of one o'clock and three o'clock in the afternoon of the 28th day of Janu-

580 ary, 1893, and by me reduced to writing; that before proceeding to the examination the witness was duly sworn to tell the truth, the whole truth and nothing but the truth; that the deposition was carefully read by the witness and then by him subscribed.

In witness whereof I have hereunto set my hand and official seal the day and year above written.

[SEAL.]

GEO. E. DAVIS,
*Notary Public for Oregon.*

(Endorsed:) Filed August 26, 1893. R. B. Lamson, clerk.

In the District Court of the United States for the District of Oregon.

THE BARGE "COLUMBIA;" OREGON SHORT LINE & UTAH Northern Railway Company, Oregon Railway & Navigation Company, Petitioners; Robert Balfour *et al.*, Cross-libellants,
*vs.*
OREGON SHORT LINE & UTAH NORTHERN RAILWAY COMPANY.

Be it remembered: that, pursuant to the annexed stipulation and on the 27th day of May, 1893, at the Occidental hotel in the city of

Astoria, I took the depositions of J. W. Babbage, H. A. Matthews, Thos. F. Neill, J. H. D. Gray, William Chadwick, W. J. Barry,
581 R. M. Stuart, and William Pohl, on behalf of the respondents Balfour, Guthrie & Co., and Malvina Short, Sven Anderson, and Annie C. Larson, in the above-entitled action now pending in said court. Which said witnesses, first having been duly and legally sworn, testified each respectively, as is set forth in their depositions, following.

C. H. SHOLES,
*Notary Public for Oregon.*

In the District Court of the United States for the District of Oregon.

THE BARGE "COLUMBIA;" OREGON SHORT LINE & UTAH Northern Railway Company, Oregon Railway & Navigation Company, Petitioners; Robert Balfour *et al.*, Cross-libellants,
*vs.*
OREGON SHORT LINE & UTAH NORTHERN RAILWAY COMPANY.

It is hereby stipulated by and between the parties hereto that the testimony of J. W. Babbage, H. A. Matthews, Thos. Neill, J. H. D. Gray, William Chadwick and W. J. Barry, witnesses on behalf of respondents and cross-libellants, Robert Balfour, *et al.*, may be taken on oral interrogatories at Astoria, Oregon, on the 27th day of May, 1893, before C. H. Sholes, notary public, between the hours of 10 a. m. and 6 p. m. Said testimony when taken to be received at the trial of said cause, subject only to objec-
582 tions as to the relevancy, competency or materiality thereof, and all objection- as to the manner of taking said testimony are hereby expressly waived.

WILLIAMS & WOOD,
*Proctors for Respondents and Cross-libellants, Balfour, Guthrie & Co.*
W. W. COTTON, *For Petitioners.*
CHAS. F. LORD,
*Proctor for Wm. Boyce.*
J. F. & E. B. WATSON &
B. B. BEEKMAN,
*Proctors for Malvina Short, Anna C. Larson, and Sven Anderson.*

It is further stipulated that the testimony of Richard Stewart, August Danielson and Wm. Pohl, coroner of Clatsop county, may be taken at the same time and place on behalf of Malvina Short, Anna C. Larson and Sven Anderson, under this stipulation.

WILLIAMS & WOOD,
*Proctors for Balfour, Guthrie & Co.*
W. W. COTTON,
*Proctor for Oregon Short Line & Utah Northern R'y Co. and Oregon R'y & Nav. Co.*

It is agreed by and between the proctors hereto that the witnesses may sign the original stenographic notes of their depositions, the signatures then to be extended in the transcript by the notary.

583 H. A. MATHEWS, sworn on behalf of the respondent-, Balfour, Guthrie & Co., on direct examination, testifies as follows:

Interrogatories propounded by Mr. FLANDERS:

1 Q. What is your name, age, residence and occupation?

A. My name is H. A. Mathews; my age is forty-seven; residence, Astoria; occupation, master of steamer.

2 Q. How much experience have you had as master of steamers?

A. Well, I have had about seven or eight years here. I have been to sea about thirty years, off and on, on steamers and sailing ships.

3 Q. Were you a member of the coroner's jury which held the inquest over the remains of Captain Marshal Short, master of the steamer "Ocklahama," in October last?

(It is understood and agreed, between the proctors hereto, that any objections may be made at the time the testimony is offered at the trial of this cause, as to the relevancy, materiality or competency of the testimony, or of the witnesses.)

A. I was.

4 Q. Did you examine the barge "Columbia" at that time as a member of that jury?

A. I did.

5 Q. Where was the barge lying?

A. It was lying on the inside of the dock, at the eastern end of the inside.

6 Q. Of the Union Pacific dock at Astoria?

A. Of the Union Pacific dock at Astoria.

7 Q. What was her condition?

584 A. She was in a pretty hard condition when I saw her; she was broken in two.

8 Q. Was she loaded with a cargo of wheat at the time?

A. Yes, sir.

9 Q. Just describe just in what condition she was?

A. Well, she was broken in two in the middle; the ends was out of her, the stern was out of her partly; and she was in a dilapidated condition, I thought, all around. I could not hardly say she was as bad as she could be, I guess.

10 Q. Had she settled on one side or the other?

A. She was listed over on the port side; she was listed out from the dock.

11 Q. Did you examine into the condition of the barge as to seaworthiness?

A. Yes, sir.

12 Q. Had any repairs been made on the barge previous to her coming down there?

A. Yes, she had lots of new top work; her top works looked as if they were pretty nearly new; they were not very old anyhow.

13 Q. What did the repairs consist of?

A. Well, she looked as if she had new decks and new guards and lots of new work put on to her top, on her timbers; looked as if she had been new topped altogether.

14 Q. Had her frames been repaired?

A. No; not that I could see.

15 Q. What was the condition of her frames?

A. They were rotten, the top timbers was, all of them pretty much. That is what her new work was fastened to.

16 Q. Did the new work appear to stand together?

585 A. No, it pulled right off in some places; it pulled right clear, the iron-work was pulled clear of the old wood.

17 Q. Were any repairs, from what you say, made to any portion of the barge except her deck and guard?

A. No, that is all I could see. There was no new work done below that I could see. Of course, I could see only half of her, as you might say. The middle of her was under water, and these were the ends I saw, probably thirty, forty, or fifty feet from each end of her.

18 Q. From what you saw of the barge that day and from your knowledge of vessels what is your opinion of the seaworthiness of the barge for carrying a cargo of wheat prior to her sinking at the dock?

A. Well, I do not think she was fit to carry wheat, not the cargo she had, anyway. She might have carried perhaps one-half the cargo, but she had too much in her according to my estimation. If she had half as much she might have got through with it all right. She was not seaworthy, I know that.

20 Q. Was she heavily loaded?

A. I should think she was, that is my opinion of it.

21 Q. What, in your opinion, was the cause of the collapse of the barge, assuming that in being brough into the dock she had sprung a leak and had then been towed to the inside of the dock, and as the tide receded had settled in the mud to the bottom of the river, loaded as she was?

Mr. Cotton, proctor for the petitioner, objects to this inter-
586 rogatory, on the ground that the witness is incompetent to express an opinion on the matter, and that the testimony called for is incompetent on the other question involved in the case as to what caused the collapse.

A. You mean to ask me if she had sprung a leak alongside the dock?

22 Q. What I am getting at, Captain, is what, in your opinion, was the cause of the collapse of the barge?

A. Well, there are two ways to answer that question; in the first place the barge had run into the dock, that I understand perfectly well. I did not see it, but I had good reasons to believe that was the fact, that she had run into the dock, and they took her around

on the other side in order to keep her from sinking, and when she sunk she fetched up on the bottom. And with all that cargo in her, and she being on the bottom, it would naturally strain her. It was bound to burst her open. She never could have stood it to fetch up on the bottom with all that cargo. She would have to collapse. You ground a vessel or barge like her with that amount of cargo and she has to give somewhere; she has to go open. That is my opinion. She couldn't stand it. There is too much heft.

23 Q. Would a seaworthy barge properly loaded resting on the bottom have collapsed as the "Columbia" did?

A. No, I do not think it would, not a good, strong-built barge; she might have stood it, that bottom is soft up there. She would have to be pretty strong to stand it with the amount of cargo she had.

587 24 Q. I mean with a proper amount of cargo?

Proctor for the petitioner objects to the expression "proper amount of cargo."

A. No.

Cross-examination.

Interrogatories propounded by Mr. COTTON:

25 Q. Did you notice anything, Captain, about any new braces in the boat?

A. No, sir, I did not.

26 Q. You don't know whether she had new braces or not?

A. No, sir; we looked very thoroughly and I did not see any. They might have been there but we did not see any; I did not see any.

27 Q. By being unseaworthy, Captain, you do not mean to say that this barge was not capable of bringing this cargo from Portland to Astoria, do you?

A. She did do it, but I do not think she could do it again. After they took that cargo out of her, I do not think she could have ever made it again in the world.

28 Q. Why not?

A. Because they were pumping her all the time from the time she left the mouth of the Willamette.

29 Q. How do you know that, Captain?

A. Because they said so in the testimony they gave.

Proctor for the petitioner moves to strike out the previous answer of the witness as incompetent, being hearsay.

30 Q. Do you know whether she had ever brought down similar cargoes before that?

588 A. I do not know that I ever knew it. She had been here, but I do not know that I ever took particular notice of her before.

31 Q. I understand you to state that in your opinion the main

cause of her breaking in two was because she took the bottom in the condition she was in?

A. Yes, sir.

32 Q. Do you know when she collapsed?

A. No, sir.

Excused.

(Signed) H. A. MATHEWS.

WILLIAM CHADWICK, sworn on behalf of respondents, Balfour, Guthrie & Co., on direct examination testified as follows:

Questions by Mr. FLANDERS:

1 Q. What is your name, age, residence and occupation?

A. My age is thirty-two next third of August; I am street superintendent at the present at Astoria, where I reside.

2 Q. Have you had any experience as a contractor or builder, and if so, how much?

A. I have; I have worked at the business in that line for sixteen years.

3 Q. Were you a member of the coroner's jury which held the inquest over the remains of Captain Short of the steamer "Ocklahama" in October last?

A. Yes, sir; I was.

4 Q. As a member of that jury did you visit the barge "Columbia"?

A. I did.

589 5 Q. Where was she lying at the time?

A. She was lying inside the U. P. dock there.

6 Q. Describe her condition and position.

A. Well, she was lying on the south side of the dock and she was just about covered with water.

8 Q. Was she listed?

A. She was listed.

9 Q. Toward or away from the dock?

A. She was listed away from the dock.

10 Q. Did you examine her timbers at the time?

A. I did.

11 Q. Describe their condition.

A. Well, they were mostly rotten.

12 Q. Had any repairs apparently been made on her?

A. Yes, sir.

13 Q. What was the nature of the repairs?

A. There had been new timbers put in and some new planking, new timbers alongside the old ones in some places, and in some places patches of planking.

14 Q. Had new frames been placed in the vessel?

A. I didn't notice any but the timbers; there were a few new timbers, I noticed that.

15 Q. How much had been done apparently upon her under the deck?

A. Well, I could not tell, because we couldn't see very well; she was pretty well down in the water, could not get to see much of her, but it was plain enough that she was pretty rotten.

16 Q. Had the repairs stayed together?

A. No, sir, in some places they had, but in some places they had not; in some places they had patched, put on new planking, and they had nailed to rotten timbers.

590 17 Q. Did they pull out in those places?

A. Yes, sir; they never held, could not hold.

18 Q. Had the sides of the barge held together, or had they pulled apart, or did you notice that?

A. The sides of the barge, well, I noticed that they were pulled apart; in places, yes, I noticed that they had pulled apart, in some places, if I remember right.

19 Q. Have you had any experience as a ship carpenter?

A. Well, nothing but repairing. I am not a ship carpenter by trade. I have repaired on the different crafts here.

Cross-examined.

Questions by Mr. COTTON:

20 Q. Mr. Chadwick, what do you mean by frames?

A. Well, I suppose that the frame is the timber and timbers.

21 Q. What timbers, you said something about timbers and something about frames?

A. Well the timbers that hold the planking. Counsel mentioned the frames and I supposed that is what he meant by it.

22 Q. What do you mean by it?

A. I mean the timbers, that is what I mean by the frame.

23 Q. Tell us that they are, what do you mean by timbers or frames?

A. The timbers the planking is nailed to.

24 Q. Do you mean across the deck?

A. No, sir, the ribs.

591 24 Q. How closely did you examine this?

A. Well, we examined just as close as we could, because of course we could not get to see right up the keel or anything like that, it was not listed over far enough.

25 Q. Was there not a good many of these new frames nailed right alongside the rotten ones?

A. Yes, there was some.

26 Q. Was there not quite a good many?

A. I did not notice very many, no.

27 Q. Are you willing to swear that there was not a new frame or rib for nearly every one of the old ones, that is as compared to men who swear that there were and that they put them in?

A. No, I would not swear that they were alongside the old ones, because I do not think there was one to each one of the old ones; no, sir, I do not think so.

29 Q. Are you willing to swear that there were not as many new frames as there were old ones in the boat?

A. No, sir; I do not think there were nothing like as many.

30 Q. But there were new frames all the way through it, were there not?

A. I did not notice all the way through; I did not notice that all the way through.

31 Q. That is, you did not examine the boat all the way through?

A. Well, we couldn't do that very well, because she was in a position that we couldn't see; we could not see on the side she was listed, because it was away down in the water.

592 32 Q. You examined at the time Captain Mathews did?

A. Yes, sir.

33 Q. Your examination was made at the same time?

A. Yes, sir.

34 Q. The boat was pretty badly torn up when you saw it?

A. Yes, sir; she was.

35 Q. Mashed up more or less at the ends and sides?

A. Yes, sir; and mashed around the stem some.

36 Q. Had the house pulled off her?

A. Yes.

37 Q. Had the new deck pulled off of her?

A. No, sir; I do not think the new deck was all off. Some of it was, I believe.

38 Q. Wasn't the deck nearly new all the way through?

A. Yes, I think the deck was pretty good.

Q. Wasn't that all mashed in?

A. The new deck?

39 Q. Yes.

A. No, I do not think it was, no, sir; if I remember right there was but a little of the deck but what was in good shape.

40 Q. Had the wheat slid off of her when you saw her?

A. They cut some holes to get down in there.

41 Q. I mean, had the wheat slid off of her?

A. O, yes; yes, sir.

42 Q. The cargo had all slid off when you saw her?

A. No, there was wheat on her then.

43 Q. How much?

A. There was wheat on the deck; I could not say, I am

593 sure, how much; it seems to me now it was sunk in; in some places there was a good deal of wheat on the fore part of the deck.

44 Q. What do you mean by her timbers being rotten?

A. I mean that they were so that they would not hold anything; they wouldn't hold a nail, just the same as any other rotten piece of timber.

45 Q. Didn't they hold enough nails to bring her down here?

A. I suppose so, yes.

46 Q. Then they did hold nails, didn't they?

A. Yes, they held nails, but I would not consider that they would hold much in a heavy strain; I would not consider that they would hold much.

47 Q. Practically in about the same condition in which old

timber gets after it has been in a house or boat for any length of time?

A. Well, for that length of time that I supposed they had been in there they would naturally decay.

48 Q. Just the same way that a house decays or any other building or any other old piece of wood?

A. Yes, sir; after a certain length of time, but of course the decay of a house timber is different from that; it is a dry rot. A house timber decayed is of a different nature. This was from water, and the other is chiefly from dry rot, as you understand.

49 Q. But the effect on the strength is just about the same, isn't it, or do you know any difference between them?

A. It would be just about the same.

50 Q. Does an old house sometimes stay together even after some of the timbers get rotten?

A. No, sir; it is necessary to renew.

594 51 Q. But it still holds, doesn't it?

A. Yes, it will hold until it falls to pieces.

52 Q. What caused this boat to go to pieces?

A. Well, from the fact, sir, that I think she was overloaded in the first place, and it seems to me that the state she was in a slight jar and a list, the way she was at, would be enough to breake her all up.

53 Q. Then when she struck the bottom the strain was too much for her; that was practically it, wasn't it?

A. It seemed to me that when she listed the heft of the wheat would break her up, pull her all apart.

54 Q. After she took the bottom you don't know when she listed, do you?

A. No, sir; I was not there when she listed.

55 Q. Was she on the bottom when you saw her?

A. She was on the bottom.

Redirect examination:

56 Q. In what part of the vessel did you find this rotten wood that you speak of?

A. Well, that was pretty well forward, I noticed. She was lying most out of the water there; and most of it, I noticed, would be probably fifteen or twenty feet from the stem where you could see the most, where the most of her was out of the water.

57 Q. The great portion of the barge was under water, wasn't it?

A. Yes, sir.

58 Q. And you could not examine that?

A. No, I couldn't get down to see anything.

595 59 Q. Do you consider the barge to have been in a good state of repair and seaworthy when she left Portland?

Objected to as incompetent; the witness is not competent to express an opinion.

A. O, I considered her totally unfit for that cargo.

Recross-examination:

60 Q. She got down here that time, didn't she, Captain?
A. Yes, sir; she got down here.
61 Q. Was she totally unfit then?
A. Well, I would not like to risk my life on a craft of that kind either coming down or going up.
62 Q. Do you know how many times? She had brought down several cargoes before repairs had been made?
A. Yes, I had seen her here a number of times before these repairs had been made.
63 Q. Do you think the repairs which had been made on her strengthened her any or made her worse?
A. Well, I think naturally it would help her some, of course.
64 Q. They would help her considerably, wouldn't they?
A. Yes, I think so.
65 Q. You base your opinion then simply on what you think about it?
A. Yes, from what I saw of her and the way she was all gone to pieces, and things spread apart all shapes; I would naturally think she was unfit to carry that cargo.
66 Q. But you were not on her when she was bringing down a cargo, were you?
596 A. No, I never was on her; I have been on her before, that is just on her deck. When I have been around the dock I would step on and off again, but never to notice her at all.
67 Q. But you never came down with a cargo with her?
A. No, sir.
68 Q. Why did you think it would be unsafe?
A. I judge of the fact from the way she broke up and the state of her wood-work.
69 Q. That is after she struck bottom with this heavy load upon her?
A. Yes, I should think a vessel in good condition would not go that way, would not spread apart that way.
70 Q. Do you know?
A. Well, I cannot say that I know, because I am not a ship-builder or a captain, but I have had experience enough, I think, with wood-work to know when I see a thing that is rotten.
71 Q. But you do not know anything about her floating capacity or anything about her holding capacity in the water, do you?
A. No, sir.
72 Q. You are simply basing your opinion upon a structure capable of holding that amount of load when she rests on land, aren't you?
A. No, no; I think it was unfit to bring that amount of wheat.
73 Q. Didn't she bring it?
A. Well, yes, she might.
74 Q. Well, didn't she bring it on this particular occasion?
597 A. Yes, she brought it; there is no question about that, but——

75 Q. Then why was she unfit to bring it?
A. But it was a risky piece of business.
76 Q. How do you know?
A. From the fact that she broke up in the way she did when she struck.
77 Q. Don't you think that a comparatively good barge would have broken up in the same way?
A. No, sir, I do not.
78 Q. Why do you think that?
A. Because I think the vessel would stand—a good vessel of that kind.
79 Q. Do you know anything about what her timbers were inside of her, have not you just sworn that you did not know?
A. No, sir. I swore that her timbers were rotten.
80 Q. Well, did you see her timbers underneath her?
A. I did; I saw the ribs we are speaking of.
81 Q. Did you see all of them?
A. No, I could not see them all because I couldn't get down in there.
82 Q. Then you don't know anything about it, do you, as a matter of fact?
A. Yes, I know what I saw.
83 Q. But you don't know what you didn't see?
A. I could not know that, no, sir.
84 Q. What end of her did you see?
A. I saw her as she was lying there, the whole length of her.
398 85 Q. I thought you said you only saw the bow to examine the timbers.
A. To see what we saw above the water; of course, we could not examine what was under the water.
86 Q. How much was under the water?
A. Well, I could not just exactly say.
87 Q. Well, how much, you say you examined a certain part of her, how much of her did you examine?
A. Well, there would be fully fifty or sixty feet of her, I should think.
88 Q. How long was she?
A. I just forgot her length.
89 Q. Well, then, state comparatively how much of her you examined?
A. Well, I should think we examined fifty or sixty feet of her.
90 Q. Well, what part of her would that be, a quarter or a third of all of her?
A. I could not say what her length is.
91 Q. Do you remember at the present time?
A. No, I don't know that I do. Her dimensions were given at the inquest, however.
92 Q. At what end of her did you see this fifty or sixty feet of her, where was this fifty or sixty feet that you saw?
A. Towards the stem.

93 Q. Then your opinion of the whole barge is based on what you saw at that end, is it?

A. Yes, it is.

Redirect examination:

94 Q. Did any portion of her stern stick out above the water?

599 A. Yes, I think there was some.

95 Q. Did you look at that?

A. Yes, sir; if I remember right we went right along on the deck. I know we examined some wood-work in there towards the stern, and it was bad. Her wood-work was bad.

(Cross:)

96 Q. If this boat had been less heavily laden she would have carried the load, wouldn't she?

A. Yes, I do not think she would have broke up like that; if she had not had as heavy a cargo in her I would not say she could not stand it.

Excused.

(Signed) WILLIAM CHADWICK.

J. H. D. GRAY, sworn on the part of the respondent-, Balfour, Guthrie & Co., testified on his direct examination as follows:

Questions by Mr. FLANDERS:

1 Q. What is your name, age, place of residence and occupation?

A. My residence is Astoria, Oregon; occupation at the present time is dealing in real estate, I suppose, although I have my license as master.

2 Q. How much experience have you had in steam navigation on the Columbia and Willamette rivers?

A. My experience in steamboating began in 1862 on these waters and extended up to 1886 or 1887; that is, in handling and managing as master, agent, owner and director of steamboat companies.

600 3 Q. Do you know the barge "Columbia," belonging to the Oregon Short Line and Utah Northern Railway Company?

A. Yes, I have known her.

4 Q. How long have you known her?

A. From the time she was built; I saw her when she was building and saw her at the time or a few hours after she had sunk.

5 Q. Have you ever in your experience as a steamboat captain, had to run barges from Portland to Astoria and from Astoria to Portland?

A. Yes, sir.

6 Q. Any considerable number of times?

A. Well, for two years and more I was engaged in that most all

the while, that is off and on; for one winter I was continually at it.

7 Q. In whose employ?

A. I was towing under contracts, mainly a contract with the Columbia River Transportation Company or the Willamette Transportation Company and the Columbia River Barge Company, I think was the title of the two companies.

8 Q. That was the Goldsmith Company?

A. The Goldsmith Company and the barge "Columbia's Chief" we built, was the Columbia River Transportation Company, I think. We owned the barge "Columbia's Chief," and I superintended the building of her.

9 Q. And you were towing with that barge under contract with the Wiliamette Transportation Company?

A. Yes, sir.

10 Q. Did you see the barge "Columbia" after the accident which occurred to her in October last?

A. Yes, sir.

11 Q. Where was she lying when you saw her?

601 A. She was lying inside the dock there.

12 Q. What was her condition?

A. She was sunk there. I saw her before they got Captain Short out of her, sunk there at the dock.

13 Q. I would like to have you describe in what way if you know, she was listed, in just what position she had taken the bottom?

A. The barge was listed in shore away from the dock. She was lying inside the dock and was listed in shore from the dock.

14 Q. How many times, Captain, did you see the barge when she was lying in that condition, inside the dock?

A. I do not know exactly, I should say I saw her most every day.

15 Q. Did you go upon and examine her?

A. I went upon her twice, I think.

16 Q. Did you look at her timbers?

A. Well, only just from going on top; I could not see much; but when the tide was out I could see it from the dock.

17 Q. What was the condition of that part of the barge which you saw as to soundness of her timbers?

A. Well, it was badly smashed, and the timbers appeared to be more or less decayed. Apparently new work had been put onto the old work without sufficient repairing or taking away of the old deck timbers.

19 Q. Did she appear to have been thoroughly overhauled and repaired?

602 A. Well, that would depend upon what they were going to use the barge for.

20 Q. I mean for carrying cargoes of wheat as lighterage?

A. Well, I should not consider it such.

21 Q. Was she heavily loaded; did she appear to have been heavily loaded?

A. Yes; she appeared to have been heavily loaded. If she had

on the load that was reported there, it was very nearly a load when the barge was new.

22 Q. Can a barge of the age of the "Columbia" was, even when repaired, carry a similar load that a barge of the same tonnage capacity could carry when new?

A. She can, if thoroughly repaired, for a short length of time, as she could when built; but it requires thorough repairing.

23 Q. What is the capacity of the barge "Columbia Chief" compared with the capacity of the barge "Columbia"?

A. When I was engaged in lightering grain we brought on the "Columbia Chief" 714 tons at one time. Her load was 650 to 700 tons.

24 Q. I mean what was the size of the "Columbia Chief" as compared with the "Columbia"?

A. Well, the depth of hold of the "Columbia" was more, and the length, I think, was a little more; she was some ten or twenty feet longer, but she was not quite as wide; and the "Columbia" being two feet higher than the "Columbia Chief," or about that, she was more apt to be tender with a heavy deck-load.

603 25 Q. Was the "Columbia" a sharp-built barge or was she a flat barge?

A. She was what we would call a flat barge, but her run forward was very sharp. She was flat on the bottom but cut away forward so that she was sharp.

26 Q. Do you know whether her builder built her with the idea of possibly putting machinery into her?

A. I was told that that was what they contemplated at the time they built her.

27 Q. That is what you understood at the time?

A. That is what I was told by, I think, some of the members of the company; I am not positive now whether I can recollect who it was or not.

28 Q. What in your opinion was the proximate cause of the collapse of the "Columbia"?

A. Well, I would like to ask for an explanation; is that, what I have heard, or what my opinion is?

29 Q. Assuming, Captain, that the barge "Columbia" loaded with 585 tons of wheat, while being towed from Portland to Astoria, ran into the Union Pacific dock at Astoria and sprung a leak in her stem, and then was towed into the inside of the dock, and the tide receded leaving her aground in the mud, what in your opinion was the cause of her collapse and of her condition when you saw her?

Proctor for the petitioner objects to the testimony asked for in the interrogatory on the ground that it is incompetent, and that the facts supposed are not established by the evidence, and on the further ground that the witness is incompetent to express an opinion.

604 A. The cause of the collapse was that as she was there and the water rolling over to the other side, she struck the bottom, and suddenly lurched to the inshore, the port bilge took the bottom;

this heavy body of grain on her deck, suddenly brought up in that position, smashed the barge right bodily over.

30 Q. In your opinion would a seaworthy barge with a load of not to exceed 450 short tons have collapsed under the circumstances and in the manner the barge "Columbia" did?

A. That would depend entirely upon the force with which she struck that bilge; it might have done so and it might not. Of course, I couldn't tell the condition. 100 or 150 tons is quite a weight. That might have made some difference.

31 Q. Do you think seaworthiness or not would have made a difference also?

A. I believe if the barge had been new, or had been repaired as I think I would have had it done, she would have stood the heft.

Cross-examination.

Questions by Mr. COTTON:

32 Q. If I understand you, Captain, the main cause of the breaking up of this barge, in your opinion, was on account of suddenly taking ground?

A. Yes, sir.

33 Q. That as long as she was floating in the water she was all right?

A. Well, if she had been floating and had gone over there,
605 without striking her port bilge in the mud, I think she would either have done that or rolled right over and rolled it off.

34 Q. Do you know whether she was resting on the bottom before she turned over?

A. I was not present, but I judge from the depth of water there, as I know it, that when the ballast was changed, when she changed over from the other way, from the information they gave me, at that instant all the water that was on the other side rolled to that side, and that, together with the grain, until she fetched up on the mud. I believe that was the cause of the smashing up of the barge in that way.

36 Q. Do you know whether this boat had a round or a flat bottom?

A. The bottom of the boat was flat, or nearly so; it was what they call a flat-bottom barge, but she was very lean forward and cut away so as to make her into a steamboat in case they wanted to, at the time she was built.

37 Q. How many tons do you think this barge would carry?

A. When new I think she carried about 650 tons to 700 tons. That is what I was told. I was never told of her bringing over that amount.

38 Q. Do you think that amount would have been safe on her when she was new?

A. Yes, I should judge so.

39 Q. Suppose she was in good state of repair what amount would have been safe on her?

A. Well, in good state of repair she would have carried 550 to 600 tons.

40 Q. In making repairs of this kind is it necessary to
606 take out old timbers or it is just as well to put new timbers in practically duplicating the old timbers?

A. Well, if they are practically duplicated and far enough down of course it is not necessary to take them out.

41 Q. The old timbers add more or less strength to it, do they not?

A. Old timbers do not do any particular damage except the weight. But if new timbers are fastened to the old timbers and the fastenings will not hold in them then of course they pull right out.

42 Q. How deep is the water at that point when the tide is out?

A. It is just about dry, very nearly dry, when the tide is out.

43 Q. Then after the tide was run out the boat was bound to take bottom?

A. Yes, sir.

44 Q. You don't know how far out the tide was at the time of the collapse?

A. No, I do not know exactly.

45 Q. Where did you find Captain Short?

A. I was not present when he was found, but he was found in one of the hatches underneath where the decks had been cut away.

46 Q. He was below the deck, was he?

A. He was just coming out through the hatch.

Q. Do they usually carry loads on these barges of the character of the "Columbia" on the deck?

A. Yes, sir.

47 Q. That is the only place where they do carry them?

A. That is the only place where they do carry them.

607 48 Q. They are built for that purpose?

A. Built for that purpose.

49 Q. Was this barge so far as floating capacity was concerned sufficient to bring down 560 to 600 tons of wheat?

A. Yes, sir, so far as her tonnage is concerned.

50 Q. Yes, and so far as her floating capacity was concerned?

A. Yes, sir.

51 Q. At the time you saw her?

A. Well, I did not see her until after she had been smashed; I did not see her when she came down that night; but I should judge from my knowledge of the barge that she was able to carry at that time, if thoroughly overhauled and properly fixed, between 560 and 600 tons.

52 Q. She actually brought down about 550 or over, from Portland?

A. I was told she brought down nearly six hundred tons, but I don't know.

53 Q. Then she was in sufficiently good condition to do that?

A. I was informed she had nearly six hundred tons.

54 Q. If she had not struck the dock?

A. And had not struck the bottom.

55 Q. Well, if it had not been necessary, or if they had not taken her around there, and she had not struck the bottom, she would probably have delivered the load all right?

A. As long as she had got here she had passed the most perilous part of it, if she had not struck the dock.

608 56 Q. Would a blow of that kind, if it occurred suddenly, with the deck-load she had on her, be a very severe strain?

A. Yes, sir.

57 Q. It would be quite a severe strain, wouldn't it?

A. A boat being placed in that position; she was lying like that, listed towards the dock. To illustrate: Supposing here is the dock; when the cargo was moved the water commenced going back and went over there, and as soon as it went by the center it rushed over, and she struck suddenly on that edge, and that threw the heft of the cargo right onto it and smashed it right down. And when she fetched up there that was the cause in my opinion and from my knowledge of the matter that did the damage.

58 Q. And that was really a blow in the direction in which she was not intended to support weight, wasn't it?

A. Of course; yes, sir.

59 Q. Is a strain of that kind exceedingly great with a cargo like that?

A. Well, of course it must have been. It would be heavy. Of course if she had gone over and had not struck bottom, probably the water would have gone until she would have upset. I think the wheat would have gone overboard over the side.

60 Q. Torn her house off?

A. Torn her house off.

61 Q. It would come up with a short turn and something would have to give way?

A. But catching on the bottom as she did there of course while if she had been new she would not probably have carried away, yet with a barge of that age and in that way, the heft carried it right over.

609 62 Q. Well, do you not think that even a new boat under like circumstances—that is a comparatively good boat, Captain, I do not mean a boat new and especially built for that purpose, but an ordinary barge, such as they have been in the habit of using along the river—don't you think that if a severe strain of that kind was applied it would be just as liable to give way as not?

A. Well, of course, that just depends upon the force and suddenness with which the blow comes. With that weight you could smash anything. But striking on the soft mud of course that large a boat would have taken the shape of the mud, it would give some. But of course when it came down there and the weight came in that shape, it smashed it. That is my conclusion. In fact that is the way several looked at the matter at the time, and I wondered why the barge was not run directly on the beach, but she laid there some time and this water came into her.

63 Q. Don't you think, as a matter of fact, Captain, that the real

cause of this accident was bad management in towing her around to the place where she was with the tide running out?

A. Well, sir; so far as that is concerned, I think the handling was bad management in not running her onto the bottom straight on and letting her sit right up.

64 Q. If she had been taken around there and run right straight onto the mud, where the strain would have been equally distributed, then she would probably have been able to stand it?

610 A. Yes, sir; and then the man in charge of her, the watchman, I judge that probably he was not experienced, or didn't do as he ought to have done; he did not use good judgment in shifting that cargo part of the time. Handling those barges I consider one of the most discriminating, requiring more judgment than anything else I did while I was steamboating. I used to have more worry—and I had steamboated for ten or fifteen years—and when I was out with these barges at night, and coming across these bays days and nights, I had more worry and trouble than in anything else I did, while they were heavily loaded.

Redirect examination:

65 Q. How large a crew did you carry, Captain, on your barge?

A. When a barge was towed by myself I generally had one captain of the barge and then used the crew of my tug, but when I was towed by other boats I always had two men.

66 Q. What qualifications are necessary for a bargemaster?

Proctor for petitioner- objects as being immaterial, there being no issue of the kind in the pleadings.

67 Q. I will change the question. Should a man in charge of a barge be a man used to steamboat navigation and the handling of vessels?

A. When I was around the barges I always took my best man I had, or next to the mate, and gave him strict instructions what to do. And I considered a bargemaster should be really competent for first officer of a steamboat.

611 68 Q. Did you observe whether the repairs on the "Columbia" were fastened to the old wood or whether they were put in independently?

A. Only in one place I noticed that one timber was apparently fastened to the old wood, and the nails pulled out, but I did not make any scrutiny of the matter because I did not expect to be called to testify.

69 Q. You did not observe it one way or the other?

A. I did not look at it with any intention; I supposed if all was like that that I saw, that it looked peculiar.

Recross-examination:

70 Q. You only observed this one timber?

A. Only one or two timbers, where some of the nails had pulled out of the rotten wood.

—Q. I understand, Captain, when you were running barges with a great degree of care you did not use the mate but the man below the mate?

A. I always chose a man to take charge of a barge that I considered competent to be a mate, a good man, and I instructed him how to load. There is a great deal of skill necessary in loading these barges. If you load them too much in one end—in fact the "Columbia Chief" once was hogged, so that it was very material in adjusting the load.

(Direct:)

72 Q. I understand you to say, Captain, that the man in charge of a barge should be a man fit to be mate?

A. That has always been my opinion.

Excused.

(Signed) J. H. D. GRAY.

612 R. M. STUART, sworn on the part of Malvina Short, August Peterson and Sven Anderson, testified as follows on his—

Direct examination.

Questions by Mr. FLANDERS:

1 Q. What is your name, age, place of residence and occupation?

A. My name is R. M. Stuart, residence Astoria and occupation deputy United States marshal.

2 Q. You may state whether you saw the barge "Columbia" at the time of the accident to her in October last when Captain Short was killed.

A. I saw her, yes, sir.

3 Q. Where?

A. At the U. P. dock.

4 Q. When did you see her?

A. I saw her while they were taking the body of Captain Short out of the wreck.

5 Q. Did you see her more than that time?

A. Yes, sir, I saw her afterwards, also.

6 Q. You may state the position of the barge with reference to the dock and her position with reference to listing and being on the bottom.

A. She was lying on the bottom and listing from the dock. Her house was all caved in.

7 Q. Did you see the condition of her timbers?

A. I went up afterwards and looked at her.

8 Q. Did you go upon her?

A. Yes, I was upon her.

9 Q. What portion of her did you examine?

A. Mostly the stern where she had fallen apart, the nails all torn out and she was very rotten there.

613 10 Q. Was the condition of her stern such that you could see through, that one could look into her any?

A. Yes; you could see where it was drawn fully that much apart. Any one could see into her where she was drawn apart, about a foot apart, that is where her stern came in into the side.

11 Q. Did you examine as well as you could the timbers inside at the stern?

A. I did.

12 Q. What was their condition with reference to soundness?

A. They were rotten.

13 Q. Had any repairs been made in her stern, so far as you could see?

A. No; not as far as I could see.

14 Q. Did you examine any other portion of the barge with reference to its condition?

A. Yes, sir; I saw the flooring; there was new flooring in her. Now I cannot call the names of the various parts because I am not an expert on that, but pieces that run across, beams or whatever they are; there were some new there, but I cannot say what they were, that was alongside the old ones.

15 Q. Did the repairs on the barge stay together or did they pull apart from the others, do you know?

A. They stayed together.

16 Q. Do you know anything about the condition of her frame other than at the stern; did you examine that?

A. No.

Cross-examination.

Questions by Mr. COTTON:

17 Q. She was lying on her side away from the dock?

614 A. From the dock; listed from the dock.

18 Q. Was that the side that was crushed in?

A. That was the side that the stern had pulled the wood away from the upper side.

19 Q. Do you know whether the framework was smashed?

A. Of the barge?

20 Q. Yes.

A. The framework was pulled all away and mashed, and you could see where it was torn considerably; fragments, considerably rotten.

21 Q. What do you mean by rotten?

A. I mean decayed wood; wood that you could take and break in your fingers.

22 Q. Did you find any new frames there?

A. As I said before, all I noticed was the top of the new flooring and the beams than ran across her; those were new.

23 Q. Did you notice any new supports?

A. No; I did not.

(Direct:)

24 Q. If there had been any new supports do you think you would have noticed them?

A. I think so; I might not have noticed them, but it seems to me I would.

Excused.

(Signed) R. M. STUART.

T. F. NEIL, sworn on behalf of Balfour, Guthrie & Co., testified as follows on his—

Direct examination.

Questions by Mr. FLANDERS:

1 Q. Please state your name, age, residence and occupation.

615 A. My name is T. F. Neil; residence, Astoria; occupation, master and pilot.

2 Q. How many years' experience have you had as master and pilot?

A. About twelve years.

3 Q. How much experience have you had on vessels generally?

A. About twenty-one years.

4 Q. Have you ever run on the Columbia river between Portland and points beyond Astoria?

A. I have.

5 Q. How many years' experience have you had on that?

A. About eleven years.

6 Q. Are you acquainted with the various captains and mates running on the boats between Astoria and Portland?

A. I am.

7 Q. Did you know Captain Marshal Short who was killed on the barge "Columbia"?

A. I did.

8 Q. Where did you know him?

A. I knew him as working on the Willamette river.

9 Q. When you were in Portland did you know him?

A. When I was running from Portland.

10 Q. State whether or not he ran to any extent between Astoria and Portland.

A. He did not.

11 Q. Do you know whether he was acquainted with the river and current between Portland and Astoria?

Proctor for the petitioner objects to this interrogatory as incompetent, and for the reason that the witness is incompetent to express an opinion.

A. Well, I should say his knowledge would be limited; he did not have much experience on this lower river.

616 12 Q. Where were you yourself on the evening when the barge "Columbia," in tow of the "Ocklahama," collided with the Union Pacific dock?

A. I will not be positive about that. What month was that in?

13 Q. The 23d or 24th of October.

A. It is possible I was on the "Astorian" as pilot at the time; I will not say for sure though.

14 Q. Were you in Astoria on that day?

A. I was on the river here somewhere.

15 Q. Do you remember the night?

A. Yes.

16 Q. What was the condition of the night?

A. It was a dark night. But I will not be positive—I remember I was here the next morning. I remember of going up to the dock, but whether it was the morning after. We had a couple of nights there was no moon, it was dark nights, but I will not be positive whether it was the morning after or two mornings after, I will not say for certain; I am inclined to think I was on the "Astorian" at that time.

17 Q. That is working on the "Astorian"?

A. Yes, sir; pilot on the "Astorian."

18 Q. Did you see the barge "Columbia" after the accident occurred to her lying at the dock?

A. Yes. I saw her lying at the dock there the morning after or two mornings after, I will not be sure.

19 Q. Did you go upon her and examine her?

A. No, not at all; never aboard of her.

20 Q. Did you see her from the dock?

A. I saw her from the dock, yes.

21 Q. Could you and did you notice the condition of the timbers from the dock?

617 A. Yes, sir; she was listed off shore.

22 Q. Did you notice her timbers at all?

A. No, it was high water when I was there; she was pretty well under water, in fact I think they had been cutting away on her upper-house. They were cutting away, some of the carpenters were at work at the time, saving window sash, etc., saving whatever they could that was worth anything.

23 Q. Do you know the character of the bottom of the river inside the Union Pacific dock?

A. It is mud, soft mud.

24 Q. What is the depth of the water there when the tide is out?

A. I wouldn't say positively. I have no idea really; there is a channel running along the dock, a gutter running along there, and the width of the vessel from the dock it is very shallow. The place has changed a good deal in the last three or four years. Never had much use for it in there.

25 Q. Are there any hard substances at all on the bottom?

A. Not that I know of.

26 Q. Whatever the character of the bottom is, is it the same all along there?

A. Inside the dock, yes, sir.

27 Q. State whether or not in your opinion, the character of the bottom there is such that supposing a seaworthy barge with a capability of carrying with safety a load of 450 tons, was aground in the mud having previously sprung a leak and brought into the inside of the dock, whether such a barge would have collapsed as the "Columbia" did?

A. I do not think she would.

618 Cross-examination.

Questions by Mr. COTTON:

28 Q. What do you mean by a seaworthy barge?

A. Well, a vessel that is capable of doing the work they call for, I suppose, a vessel that is strong and staunch.

29 Q. Then, in answer to that question, you meant a boat that is capable of sustaining a load in the mud, will sustain a load in the mud?

A. Yes, most assuredly.

Redirect examination:

30 Q. Should a barge which was capable of carrying a given load in safety afloat regularly be capable of holding and supporting a load of the same amount on that mud at the dock?

A. I should say so, most assuredly.

Recross-examination:

31 Q. Should a ship, Captain, which is capable of floating a certain cargo, be capable of sustaining it when it goes on rocks?

A. Well, that would be guesswork. If it was smooth water and she lay easy she would stand it, undoubtedly.

32 Q. Can you hog a barge even when she is floating in the water by loading it improperly?

A. Yes, sir; most decidedly.

33 Q. Suppose you put all of her load in the middle, wouldn't that hog it?

A. Yes, sir.

34 Q. A good big strong barge?

619 A. Well, I have seen vessels, Mr. Cotton, that you could suspend. English-built vessels under the present rules that you could suspend, and they wouldn't budge or move.

35 Q. But an ordinary river steamboat you cannot do that with?

A. Not in our waters; they are not built for that.

36 Q. And you take even a strong barge and support her at both ends you would be apt to break her?

A. Most assuredly.

Excused.

(Signed) THOMAS F. NEIL.

W. J. BARRY, sworn on the part of Balfour, Guthrie & Co., testified as follows on his—

Direct examination.

Questions by Mr. FLANDERS:

1 Q. State your name, age, place of residence and occupation.

A. My name is W. J. Barry; residence, Astoria; occupation, at present doing nothing.

2 Q. State whether or not you were a member of the coroner's jury which held an inquest over the remains of Captain Short last October?

A. I was.

3 Q. As a member of the coroner's jury, did you examine the barge "Columbia"?

A. Yes, sir.

4 Q. Where was she lying when you examined her?

A. Inside the company's dock.

5 Q. Did you as a member of the coroner's jury examine into the condition of the barge?

A. We did.

620 6 Q. You may state how you found her timbers with reference to soundness.

A. We found them in a very bad, dilapidated condition, rotten.

7 Q. What portions of the barge did you examine?

A. The timbers, planking and deck.

8 Q. Was that in the stern of the barge or in her forward end?

A. In the bow.

9 Q. How much of the barge with reference to her total length do you suppose you examined?

A. There was about twenty to forty feet of her bow out of the water at the time, and amidships was under water, except on the starboard side which was out of the water. Her stem was out of the water about thirty or forty feet.

10 Q. Did you examine her stern also?

A. Yes.

11 Q. When you say her timbers were rotten, how rotten were they?

A. So rotten you could break them in your hands.

12 Q. Had any repairs been placed on the barge?

A. Evidently had been a new oak ribbon put around about six inches wide and two or three inches thick; placed around forward. I don't know how far it went, and new deck planking put on forward.

13 Q. Had she any new ribs?

A. None that I saw.

14 Q. Any new beams?

A. None that I noticed.

621 15 Q. Did you look to see whether there had been?

A. I did not go down into the hold at all. They might have been under the new decking and I couldn't see them.

16 Q. If there had been repairs of that sort, would you have noticed them?

A. No; I could not say as I would; that is, under the decking forward I wouldn't have noticed them, because I did not go down into the hold at all.

17 Q. Did you examine her stern?

A. Very little, just looked it over.

18 Q. Did you notice whether the starboard part of the stern was pulled apart or not?

A. She was all wrenched all over the whole length of the barge, seams all open and planking pulled loose.

19 Q. Where did you find rotten timber on her?

A. Forward of the house at the bow of the barge that was the place that we particularly looked at, where the break was in the bow and port side forward.

20 Q. Was there a break in the decking at that place?

A. No.

21 Q. How did you see this rotten timber?

A. There was a hatch forward; right in the eyes of the boat, just forward of the bits, a small hatch sixteen or eighteen inches square, and we looked down through that, and besides the bottom part of the hull had moved to the starboard side, and we could see there where the ends of the timbers were broken off and sticking out. The parties that went down there passed up several pieces of the timber.

622 22 Q. Did you see any repairs below the deck made in this place?

A. None that I noticed.

23 Q. Would you have noticed them at these particular plates if there had been any there, do you think?

A. I think so; yes.

Cross-examination.

Questions by Mr. COTTON:

24 Q. Do you say her stern and bow were out of the water?

A. Yes; that is, the decking and at high water there was maybe about three feet of her bow sticking out and the same of the stern.

25 Q. Was she higher at the stern and bow than in the middle?

A. Yes; she was hogged and broken in the middle.

26 Q. And broken down on the side away from the dock?

A. Yes, sir.

27 Q. Did you examine the float into which she ran on the other side of the dock?

A. I did not examine it particularly, just looked at it from the dock.

28 Q. Do you know how far she cut into that?

A. Did not cut into it at all; it cut into the barge.

29 Q. You are sure she did not cut into that float at all?

A. Yes, sir.

30 Q. You are quite sure of that?

A. Yes, sir.

31 Q. Did you examine it?

A. I stood there at the dock and looked down on it. That
623 float she ran into is made of heavy timbers bolted together and it would be almost impossible to cut it.

32 Q. Well, did she cut into it?

A. No, sir; they pointed out the mark out there; there was just a dent in it, that was all.

33 Q. How deep?

A. Not very, a couple of inches.

34 Q. You are sure of that?

A. Yes, sir; I looked at it particularly.

35 Q. And you are as sure about that as you are about anything else you have testified to?

A. That is what I say; yes, sir. The bow of the barge evidently carried away and went right underneath. They pointed out that and we looked at it particularly and went down on the dock to see it, and it was not broken at all.

36 Q. What kind of timber was that float made of?

A. Oregon fir, I think.

37 Q. Bolted together?

A. Yes, sir.

38 Q. How thick is it?

A. I do not know. It is three or four feet wide.

39 Q. You don't know how thick it is?

A. No, sir; I did not get down to examine it at all.

40 Q. You say you saw no new beams in this boat?

A. No; I did not see any.

41 Q. You did not see any at all?

A. No, sir.

42 Q. Not even one?

A. Not even one. At this time, you remember, I did not go down under the deck at all, but simply looked through this hole sixteen or eighteen inches square up forward in the eyes of the boat.

624 43 Q. And all of the testimony you have given is based on the examination you made?

A. That was the only examination that was made.

44 Q. Did Captain Mathews and Chadwick make any greater examination than you did?

A. Yes, they did. I am not positive whether they were down inside the hold or not, but they went into a skiff and went alongside, but I didn't care about getting wet and I didn't go down.

45 Q. Was her bow and stern resting on the bottom when you saw her?

A. At low water it was, I think.

46 Q. How low does the water get there at low water?

A. It ran down at that time so that there was almost the depth of the barge outside the water. She was twisted and hogged also in the center, the wheat all shifted to the port side.

47 Q. How many days after the accident did you see her?
A. I think it was some two or three days.
48 Q. You don't know anything about whether or not there were any new frames in her or not?
A. No, sir; I did not go down there. All the new work I saw on her was the ribbon and deck forward. That was evidently new.
49 Q. Was there not new decking elsewhere in her stern?
A. I could not say positively as to that. I do not recollect. What we were looking at more particularly to see: the captain of the barge testified there were no hatches to go down through
625 except that main hatch in the house; and we were investigating more particularly the death of Captain Short; and from what I saw there I came to the conclusion that if the captain of the barge knew his business at all there was no necessity of either one of the men being drowned.
50 Q. Why?
A. There was a hatch there, that square (indicating) that the men went down, right over the hold, and could have come up out of there.
51 Q. But they didn't do that?
A. No, sir.
52 Q. Was that hatchway in plain sight?
A. It was. There was also another hatchway on the starboard side, evidently just inside the house, that was all clear of wheat at the time we examined it, and they could have come out of that if they wanted to. But the captain of the barge said there were no such hatches on the vessel, and evidently knew nothing whatever about it.
53 Q. But the hatchway was there in plain sight?
A. It was there. It was sent down flush with the deck. It is evident that the men knew nothing about the barge but I believe he claimed he had been acting on the barge for several weeks or a month.
54 Q. You saw the hatch easy enough when you looked for it?
A. Yes, sir; no trouble to find it at all.
55 Q. And anybody really who had eyes could have seen it easily if he wanted to?
A. If he was on the barge he could have seen it.
56 Q. This was right over the break?
A. It was just in front of the break; the bits of the boat were right there and it was right off to the fore side of that.
626 57 Q. What timbers are those that you refer to that were rotten you say?
A. The timbers inside the hull that the planks were fastened to.
58 Q. How were the planks?
A. Rotten.
59 Q. All rotten were they?
A. All that I saw.
60 Q. You could very easily crumble them all, that is the side of the boat and everything else by squeezing it with your hand?

A. Well, the inside of the boat where the paint had not protected it you could, yes.

61 Q. The whole thing?

A. Yes, sir; it was all black, decayed.

62 Q. You could have gone down below very easily and kicked a hole through if you wanted to?

A. I believe that I remarked at the time that a man with a good pair of boots could have kicked a hole through that barge.

63 Q. Very easily?

A. I don't know as he could very easily but I believe that he could.

Excused.

(Signed) W. J. BARRY.

(The testimony of this witness was read over to him at the time of taking, and he pronounced the same correct as above transcribed.)

WILLIAM POHL, sworn on the part of Malvina Short, August Peterson and Sven Anderson, testified as follows on his—

Direct examination.

Questions by Mr. FLANDERS:

1 Q. Please state your name, age, occupation and place of residence.

627 A. My name is William Pohl; my residence, Astoria; occupation, undertaker and county coroner.

2 Q. Were you county coroner in October last?

A. I was.

3 Q. Did you hold an inquest over the remains of Captain Marshal Short, of the steamer "Ocklahama"?

A. Yes, sir.

4 Q. At the time did you and others make an examination of the barge "Columbia"?

A. Yes, sir.

5 Q. Where was she at the time?

A. She was inside of the Union Pacific dock.

6 Q. What was her condition?

A. Badly broken up.

7 Q. Did you examine into the condition of her timbers as to their soundness?

A. Yes, sir.

8 Q. How were they?

A. Good many of them were unsound.

9 Q. How unsound and what were unsound?

A. Well, I am not an expert at the names of timbers in a ship, but pieces that I think were in the hull that planks were nailed on, might say the ribs of the ship, they were rotten so that a great many of them wouldn't hold the nails at all; the nails would pull right out.

10 Q. What portions of the barge did you examine?
A. Well, all over.
11 Q. Did you examine the bow of the boat as far as you could see?
A. I examined the bow and also the stern.
12 Q. What repairs appeared to have been made, if any, upon the barge?
628 A. There was repairs made in the deck and may have been a few planks put on the side; I would not say for sure now, but mostly on the deck.
13 Q. Upon what were those new repairs fastened, or did you observe?
A. Well, to the best of my knowledge, there were some cross-beams put in the deck, and planks also, and they were partly nailed on these new cross-beams and partly on the old ones.
14 Q. Where they were nailed on the old ones did the nails hold or not?
A. The deck part seemed to be all right, but the planks of the sides had got loose, some of them, and sprung out like from the nails.
15 Q. Was there much or little rotten timber in the barge?
A. Considerable.
16 Q. Where you found rotten timber did you find fresh repairs alongside?
A. I could not say they were right close by; they may have been pretty near it.
17 Q. Have you pieces of timber in your possession as coroner?
A. Yes, sir.
18 Q. Can you produce them if required by the court?
A. Yes, sir.
19 Q. Would you produce them otherwise?
A. I would be willing to show them to most any one.
20 Q. But I mean to let them go from your possession?
A. No.

Cross-examination.

Questions by Mr. COTTON:

21 Q. You say the good timber was not near the rotten; how was it; please state, just describe the position of it, please.
629 A. Well, just as I said before, there may have been some planks, I think there were a few planks put on the side of the hull, but of course there might have been bad timbers right alongside of it and there might not have been. We did not examine every foot of the barge but just in places. The planks had separated.
22 Q. Where did the barge break, that is the grand collapse? In the center?
A. Yes, it broke—it seemed to be broke both ways. The whole side, the whole side was split open; and also it seemed to be broken the other way.

23 Q. In the center?
A. Right in the center like. The keel seemed to be broken.
24 Q. Were the two ends higher than the middle?
A. I knew the stern was; I think the bow also was.
25 Q. Did you notice any new frames, new braces, or ribs in the barge?
A. Ribs that were going down to the keel and up?
26 Q. Yes.
A. I don't remember of any.
27 Q. You do not remember whether there were any or not?
A. No, there may have been.
28 Q. Were all the timbers in the boat rotten?
A. No, I guess not.
29 Q. They were not all in the condition of the pieces which you have?
A. No.
30 Q. That is even the old timbers?
A. No.
31 Q. Well, what proportion of old wood do you think you found in it?
630 A. Well, I cannot tell without taking them all to pieces, but sufficient to make the barge very unsafe, in my opinion.
32 Q. The pieces which you picked up were the rottenest pieces that you could find there, were they not?
A. No, there were many more just as bad or worse.
33 Q. Many more just like these?
A. Yes, sir.
34 Q. But many more pieces which were a good deal better?
A. Yes, lots of it was better than that.
35 Q. How big a break was there in the bow of the boat where the leak was, or could you tell?
A. No, I couldn't tell; that is, I could see the one side that was up out of the water; the other side we could not see how big the break was. It was leaning like that, you know.
(Indicating an inclination.)

Excused.
(Signed) WILLIAM POHL.

J. W. BABBIDGE, sworn on the part of respondents, Balfour, Guthrie & Co., on direct examination testified as follows:

Questions by Mr. FLANDERS:

Q. What is your name, residence and occupation?
A. My name is J. W. Babbidge; residence, Astoria; occupation, steamboating.
1 Q. How much experience have you had steamboating?
631 A. I have been steamboating on the river here since 1867.
2 Q. Continuously?
A. Continuously. I suppose you call it steamboating. Two or three years I was piloting on the river, but it is pretty near the same thing.

3 Q. Have you ever been engaged in the business of towing barges or lighters on the Columbia and Willamette rivers between Astoria and Portland?

A. Yes, sir, I have.

4 Q. For how many years?

A. Well, there was one winter of 1873 and '74 that I was towing and lightering; and after that I was running a passenger boat until 1887; the last month I was working for the company in 1887 I was towing and lightering again.

5 Q. For how many years did you work for the O. S. N. Co. and its successor, the O. R. & N. Co.?

A. Twenty years.

6 Q. Do you know the barge "Columbia"?

A. Yes, sir.

7 Q. Did you see her after the accident occurred on her at which Capt. Short was killed?

A. Yes, I saw her at the wharf; I was on the wharf; I was not on board of her at all.

8 Q. Did you look at her to see her condition from the dock?

A. Well, yes; in a measure, around the stern. The bow was pretty well under water, except the starboard bow; her stern was sticking up out of the water.

9 Q. You may describe her position in which she lay, with reference to the ground?

632 A. She was lying over on her port side; her bow was out on the starboard side, and she broke down in the middle, and her stern was sticking up and was out. I was not thinking to be called on as a witness, but I noticed even in the coroner's jury that they had put some new planking in the stern of the barge; but I seen they had separated from the old plank; there was two right up along the deck that was new; and from what I saw from the wharf, I think there was nothing to fasten the new plank to. It looked as if they had just drawn right apart.

10 Q. What did the repairs on the barge appear to consist of?

A. What I saw there, I just saw these planks that were put in the stern. I did not go on board or look at her any more.

11 Q. Did you see her deck?

A. No, I did not see the deck; the deck was pretty much all under water when I was there.

12 Q. From what you saw of the barge, would you consider her to have been in a state of thorough overhauling?

A. Well, I should not suppose she was; I don't see how she could be, unless she had been all built over, at the age she was.

13 Q. What was her condition at the time you left the company?

A. When I left the company, Captain Troup——

Objected to as incompetent and hearsay.

14 Q. Never mind what Capt. Troup told you. All I want
633 to know is, what you know yourself of the condition of the "Columbia" barge when you left the company?

Objected to as immaterial by petitioner-.

A. Well, the state of the barge at the time I left the company, I know that 450 or 475 tons was all that was allowed to put on her, and I had orders from Capt. Troup not to take any chances with the barge in towing.

15 Q. During the last years you worked for the company you may state what loads of what the barges in general and the "Columbia" in particular, carried.

Objected to by petitioner- as immaterial.

A. Well, 450 to 475 tons is all I know of their carrying at that time.

16 Q. At the time the "Columbia" was a new barge, you may state if you know what her carrying capacity was.

A. Six hundred tons was the most I ever knew them to carry on her; and at that time when she was new, she was cramped with that, and they had sixty cords of wood in her hold to make her stand up; but afterwards when the boat became water-soaked, that wood was taken out.

17 Q. Was the "Columbia" a sharply built boat, or was she a flatly built boat?

A. Well, she was flat on the bottom and sharp on the bows; built something similar to steamboats.

18 Q. Was she built with the idea of converting her into a steamboat, do you know?

A. Well, that is what they claimed when they built her—the old O. S. N. Co.

19 Q. Was she a sharper boat than the "Autocrat" and "Columbia Chief," and other barges?

634 A. She was a narrower boat than the "Columbia Chief," but I would not say that she was narrower than the "Autocrat," because I do not know that; but I know the "Columbia Chief" was a wider boat and not quite as long. The "Columbia Chief" was built as an opposition.

20 Q. From what you saw and know of the barge state whether in your opinion she was or was not seaworthy and fit to carry a cargo of grain from Portland to Astoria at the time of her accident?

A. From what I saw of her there I think if they put grain on her she ought to be handled with care. Of course I did not go aboard of her or anything of that kind. I do not know what the company did with their barges after I left; but I know when I left the company's employ they were not in very good condition; but they claimed, I believe, that they made repairs on this barge; and all I saw was her stern where she was sticking out of the water where any new work had been done; and I did not go to see what condition the barge was in or anything else. Just went there the same as lots of others.

21 Q. Do you think that a seaworthy barge, and not overloaded, would have collapsed on the bottom as the "Columbia" did?

A. It don't seem to me that she should; but I don't know whether the barge was on the bottom when she collapsed, or anything about that.

22 Q. But assuming that she was?

A. No, I should not think she would there, because if she was on the bottom, I know the mud is very soft there and filled in.

635 Cross-examination.

Questions by Mr. COTTON:

Q. In answering that question, that a seaworthy barge would not do this, you take into consideration Mr. Flanders' remarks that the boat was not overloaded, do you not?

A. Well, of course I don't know whether the barge was overloaded or not; I don't know anything about that.

23 Q. Well you said a good barge would not have collapsed if it had not been overloaded. What do you mean by overloaded?

A. Well, loaded with more than the barge was able to carry.

24 Q. More than she was able to float?

A. More than she was able to carry with safety is what I call overloaded.

25 Q. Do you mean float with safety?

A. Yes, float with safety to come here to Astoria. Of course if they were going to leave their cargo further up the river the barge might be loaded deeper than she would to come here.

26 Q. You have to handle all barges with greater or less care, don't you, in the way of loading?

A. Yes, all barges and steamboats, too, so far as that goes.

27 Q. You hog them very frequently now and then by loading improperly?

A. You do if you have men that don't know their business.

28 Q. That is, they load them the wrong way?

636 A. Yes; they must be loaded all over.

29 Q. Then the strength of the barge will depend very largely in the way she is loaded and the way she is handled after she is loaded?

A. I know that the strength of the barge depends a good deal on the condition she is in, I should think.

30 Q. Can't you hog a new barge?

A. You can hog a new barge, but you can hog an old barge much easier.

31 Q. Certainly, because it is not as strong; but suppose you take a barge of comparatively good strength and of fair condition, such as you would be willing to use on the river and put on 500 or 550 tons of wheat, and then sink her so that she rested on her bow and stern; would that have a tendency to hog her?

A. Yes, it would have a tendency to hog her that way.

32 Q. It would hog even quite a strong barge, wouldn't it?

A. Yes, it would; if you got anything hard under her bottom to sink her on.

33 Q. It would hog what you call a seaworthy barge?

A. Yes, if you are going to hang them up on both ends on anything hard it would; but I don't consider that that bottom there is a hard bottom.

34 Q. Suppose you turn her over suddenly, what effect would it have?

A. I don't know how a flat bottomed barge is going to turn over if she is on the bottom.

637 35 Q. Suppose she did turn over?

A. I don't see how she is going to turn over.

36 Q. Well, she did turn over as a matter of fact?

A. Well, I don't consider that when she turned over she was on the bottom.

37 Q. Were you there?

A. No, I was not there.

38 Q. Very well, if you will kindly answer my questions, Captain, and not testify to what you do not know, we will get along faster. Suppose she did turn over; would that subject her to any strain?

A. Well, I can't see how she is going to turn over; her bottom is as flat as this floor, and if she rested on the bottom how could she turn over?

39 Q. Well, suppose she did?

A. I don't suppose anything about it; I don't see how she could turn over.

40 Q. Well, Captain, will you kindly answer my question?

A. I can't answer it, for I don't know how she could turn over.

41 Q. You have supposed a lot of things for Mr. Flanders, haven't you?

A. I don't know that he supposed anything.

42 Q. You were willing to suppose anything he asked you. Now just suppose a moment for me that she did turn over?

A. Well, I would not suppose she would turn over if she was on the bottom, because I have been on boats long enough, that with that kind of a bottom, I don't see how they are going to turn over, when they are once on the bottom.

638 43 Q. Isn't she sharp at both ends?

A. She was sharp forward, and had a stern on her something like one of these stern-wheel boats; but they are flat on the floor.

44 Q. You have not sufficient imagination then to suppose she would turn over?

A. No, sir; I have not.

45 Q. You don't know whether she turned over or whether she did not, do you?

A. I don't know anything about that; I didn't see her; I know she was lying on her side there, the starboard bow sticking out of the water. I suppose probably at an angle of 45 degrees where she lay, when I was there; and that is all I know about it.

46 Q. Was she on the bottom then?

A. Well, I suppose part of the boat must have been on the bottom; the stern was out of the water; it was high up when I was there.

47 Q. Was she listed over to one side?

A. Somewhat, yes.

48 Q. Didn't she turn over, then?

A. Well, she turned over as far as this list went.

49 Q. Then she had turned over when you saw her?

A. Well, the barge had a list; she had all the grain on that side of her; the grain seemed to have been over on the port side.

50 Q. Well, then, hadn't she turned some?

A. Well, the barge had a list there; that is all there is about it. If the barge had been setting on the bottom, I don't see how she could have listed over that way.

639 51 Q. Well, she actually did have a list?

A. She had a list all right.

52 Q. You did not examine her timbers?

A. No, I did not go and examine her timbers; I didn't have any business on board of her; I just went up there out of idle curiosity.

53 Q. If she had been placed in the bottom square, so that the mud was supporting her, in your opinion she would not have turned over at all?

A. I don't see how she could.

54 Q. You have had enough experience in barges similar to that kind to be sure of that, have you not?

A. Yes, I have. If she had been placed on the bottom I don't see how she could have turned over. It is easy enough for a barge to turn over if she is afloat and is overloaded.

55 Q. Was there more danger of her turning over behind the dock then than there was coming across the bay?

A. Well, I don't know as there would be more danger behind the dock if she didn't have water in her; I don't suppose she had any water in her when she came across the bay. It seems that the barge then had water in her and was leaking, and that would make her turn over.

56 Q. Would the shifting of her cargo have anything to do with it?

A. Well, if the barge had water in her, of course it would be a hard matter for them to keep her up, I should think as long as she was afloat. She is bound to go one way or the other if she has very much water in her.

640 57 Q. You don't know anything about the facts of the case, do you, when it occurred or anything of that kind?

A. No, I was not in Astoria at the time. I only saw it a day or two afterwards. I came down here the next morning.

58 Q. At the time they were bringing down 450 tons they were doing that all on the barges, were they not?

A. Well, the "Columbia's Chief" was allowed to carry more than the other two were.

59 Q. The other two barges carried 450 tons?

A. Well, from 450 to 475 tons, while I was working for the company. That was the last of my work there.

60 Q. That was in 1887?

A. Yes, sir.

61 Q. Did they use to handle that load and bring it down?

A. Yes, they used to bring it down.

Redirect examination:

62 Q. This is a direct question inadvertently omitted. Captain, do you consider it good navigation to bring a loaded barge across Cathlamet bay at night in the winter time?

A. Well, we never did when I was working there for the company.

63 Q. Do you think it safe or prudent to do so?

A. I do not know now. There are more beacons and lights there on the bay. A man might do it now when he could not do it at that time.

64 Q. At that time did you have orders not to do it?

641 A. I had orders not to do it at that time. I would not have done it any way—not a loaded barge.

65 Q. Would you yourself do it today?

A. Well, that depends on circumstances, what kind of a night it was.

66 Q. I mean on a dark night?

A. If it was a night that I could see the lights I might do it.

Excused.

(Signed) J. W. BABBAGE.

In the District Court of the United States for the District of Oregon.

THE BARGE "COLUMBIA;" OREGON SHORT LINE & UTAH NORTHERN Railway Company, Oregon Railway & Navigation Company, Petitioners; Robert Balfour *et al.*, Cross-libellants,

*vs.*

OREGON SHORT LINE & UTAH NORTHERN RAILWAY COMPANY.

STATE OF OREGON, }
*County of Multnomah.* }

I, C. H. Sholes, a notary public in and for said county and State, do hereby certify that, pursuant to the foregoing stipulation I took the depositions of the witnesses J. W. Babbage, H. A. Matthews, Thos. E. Neill, J. H. D. Gray, William Chadwick and J. W.

642 Barry, and Richard Stewart, at Astoria, Oregon, on the 27th day of May, 1893, between the hours of 10 a. m. and six o'clock p. m.

That said witnesses were by me duly sworn to tell the truth, the whole truth, and nothing but the truth, in the cause above named. That said examination was conducted on behalf of the respondent by Mr. J. C. Flanders, and on behalf of the petitioners by Mr. W. W. Cotton, proctors for the respective parties.

That the witnesses waived the reading of their depositions unless otherwise specified therein, and by agreement of counsel, the shorthand notes of their depositions were subscribed by the witnesses.

In witness whereof, I have hereunto subscribed my name and affixed my notarial seal this 5th day of June, 1893.

C. H. SHOLES,
*Notary Public for Oregon.*

(Endorsed:) Filed July 12, 1893. R. B. Lamson, clerk.

EXHIBIT 1.

Union Pacific system, Pacific division.

Oregon Short Line & Utah Northern Railway Co. (lessee), Oregon Railway & Navigation Co.

*Circular No.* 1.

PORTLAND, OR., *July 12th*, 1892.

After July 15th, 1892, this company will charge 50 cents
643 per registered ton for towing vessels from the Pacific ocean, or Astoria to Portland and return to the sea, and 35 cents per registered ton for towing vessels one or both ways between the Pacific ocean and Astoria, subject to an additional charge of ten cents per registered ton on vessels with cargo towed from sea to Astoria or Portland; and a charge of $20.00 for tug's hawser each way between Astoria and the sea when the same is used.

The rates above named will apply only on vessels loaded with grain or grain products for export and will include the services of this company's bar and river pilots who are duly licensed by the State board of pilot commissioners. The rates will not apply on vessels that do not employ this company's boats for the handling of lighterage and moves in port, etc.

Vessels paying the above rates will be moved within the harbor limits of Astoria or Portland at a charge of $25.00 for each steamboat used for each move. No additional charge will be made for taking vessels through drawbridges at Portland provided this company is released from liability for damages that may be sustained by vessels while passing through such bridge.

Necessary lighterage of vessels paying the above rates will be handled between Portland and Astoria for $1.50 per ton of 2,000 lbs., or 40 cubic feet, company's option, except grain or grain products, which will be handled downstream for 50 cents per ton, subject to an additional charge of 25 cents per ton when passed over wharf at Astoria.

644 If shippers or owners desire to load and discharge their lighterage, this company will furnish barges and tow same loaded with lighterage, with the express understanding that the company will neither load nor discharge lighterage, and no responsibility will be assumed for count or condition of same, and no receipts of any character will be given.

For use of barge a charge of $25.00 for each day, or portion thereof, will apply during the whole time the barge is employed in

the service, including the time that may be consumed in towing empty barge to wharf or vessel from which lighterage is taken. In addition to this $150.00 will be charged for towing each barge-load between Portland and Astoria.

The maximum capacity of barges furnished will be 450 tons weight, and loading in excess of this weight will not be permitted. Any excess of lighterage over capacity of barge or barges employed will be subject to the general rate of $1.50 per ton weight or measurement hereinbefore provided.

All charges due the company must be paid before tug is furnished to move the vessel from Astoria to the sea, and any claim against the company must be presented before the vessel leaves Astoria.

B. R. PEGRAM,
*Superintendent Water Lines.*

Approved:

R. W. BAXTER,
*General Superintendent.*

645 Pacific division.

*Freight Tariff, Supplement No. 1.*

PORTLAND, OR., *March 25th*, 1892.

Referring to the above tariff naming rates for Columbia River towage from the Pacific ocean or Astoria to Portland and return, lighterage, etc.

Effective with tariff, make the following correction:

Vessels towed through any bridge at Portland, excepting the railroad bridge, will be charged $25.00 each way for each bridge in addition to the regular towage rate, or for moving a vessel in port, the ship to assume all risk.

No charge in addition to the regular rate will be made on vessels passing through the railroad bridge.

In no case shall a greater charge be made between intermediate stations on same line, in same direction, on like property.

B. CAMPBELL,
*G. W. F. A., Portland, Or.*
J. G. WOODWORTH,
*A. G. W. F. A., Portland.*
B. R. PEGRAM,
*Supt. Water Lines.*
J. A. MONROE,
*G. F. A., Omaha, Neb.*
C. S. MELLEN,
*G. T. M., Omaha, Neb.*

646 (Here follow photolithographs marked pp. 647 & 649.)

Nos. 313 & 314
The Barge "Columbia"
} p. 647

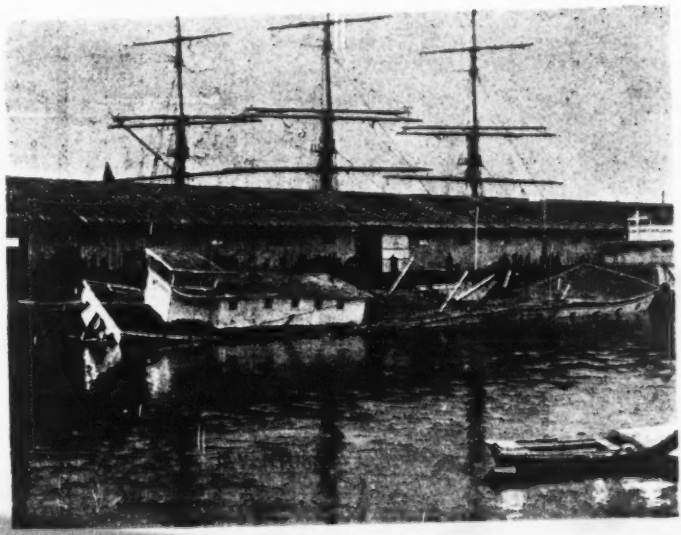
EXHIBIT 2.

408
384
24

No. 313+314.
The Barge
"Columbia"
Ex. p. 649

Exhibit 3.

Exhibit 4.



651

EXHIBIT 5.

Union Pacific system, Pacific division.

Office of the general superintendent.

In your reply refer to No. 8152.

PORTLAND, OR., *Nov.* 12*th*, 1891.

Capt. B. R. Pegram, supt. water lines, city.

DEAR SIR: I hand you herewith your appointment as superintendent of the water lines of this company. It is the intention of the management that your authority as such shall be greater than has heretofore been vested in our superintendent. The entire management of the steamers will be under your control and jurisdiction, and you will have authority to control captains, engineers, and the entire force pertaining to the boats, and will have the direction of all repairs, etc., pertaining thereto. Your jurisdiction, however, does not extend to the steamers that are in charge of Messrs. Goodall, Perkins & Co., but I shall expect you to incidentally keep posted in regard to them, and will be pleased to receive any suggestions or recommendations that you may have to make relative to them, particularly while at this end of the route. In short, as your department is a business of itself, we desire that you should have all the authority that is necessary for the successful handling of it, and we shall look to you for results.

Yours truly,

E. McNEILL.

Enclo.

652

Union Pacific system, Pacific division.

Oregon Short Line & Utah Northern Railway Company, lessees of the Oregon Railway & Navigation Company.

PORTLAND, OR., *Nov.* 12, 1891.

Capt. B. R. Pegram is hereby appointed superintendent of water lines, with headquarters at Portland, Oregon, vice Captain J. W. Troup, resigned, and will have jurisdiction accordingly.

Appointment to take effect this date.

Approved:

E. McNEILL,
*General Superintendent.*

E. DICKINSON,
*Assistant General Manager.*

*Certificate No. 22.*

Official number—Numerals: 33955. Letters: —.

THE UNITED STATES OF AMERICA.

Sec. 4319, Rev. Stats. Catalogue No. 538.

*Certificate of Enrollment.*

Enrollment.—In conformity to title L, "Regulations of vessels in domestic commerce," of the Revised Statutes of the United States, J. C. Ainsworth, pres., having taken and subscribed the oath required by law, and having sworn that the Willamette Transportation & Lock Company are citizens of the United States, and sole owners of the ship or vessel called the "Columbia" of Port-
653 land, whereof E. Patterson is at present master, and is a citizen of the United States, and that the said ship or vessel was built at Portland, Oregon, in the year 1874, as appears by her enrollment No. 5, issued at this office, dated Sept. 15, 1874, now surrendered, owners changed, and said enrollment having certified that the said ship or vessel has one deck and no mast, and that her length is one hundred and ninety-three feet; her breadth, thirty-one feet; her depth, ten feet; her height, — feet; that she measures one thousand and thirty-nine and $\frac{73}{100}$ tons, viz:

| | Tons. | 100ths. |
|---|---|---|
| Capacity under tonnage deck..... | 436 | 55 |
| Capacity between-decks, above tonnage deck, capacity of inclosures on the upper deck, viz..... | 603 | 18 |
| Gross tonnage..... | 1,039 | 73 |
| Deductions under section 4153, Revised Statutes, as amended by act of August 5, 1892..... | ..... | ..... |
| Net tonnage..... | ..... | |

That the following-described spaces, and no others, have been omitted, viz: ——, and that she is a barge, has a sharp head and a square stern, and the said J. C. Ainsworth, having agreed to the description and admeasurement above specified and sufficient security having been given, according to the said title, the said ship or vessel has been duly enrolled at the port of Portland, Or.

654 Given under my hand and seal at the port of Portland, in the district of Willamette, this 20th day of March, in the year one thousand eight hundred and seventy six.

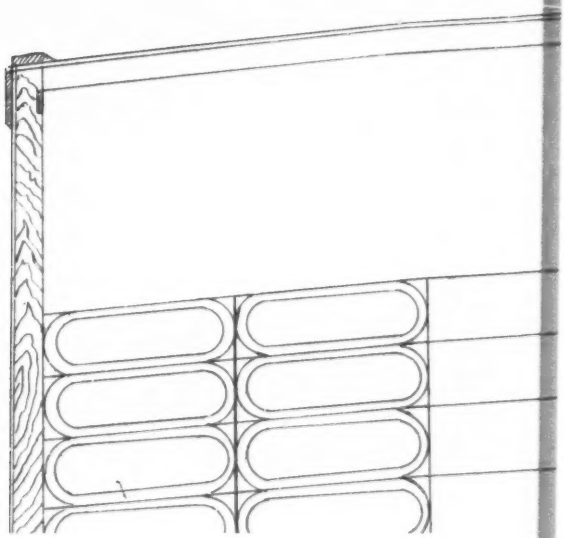
(S'g'd) F. N. SHURTLEFF,
[SEAL.] *Dep. Collector of Customs.*

CUSTOM-HOUSE, PORTLAND, OREGON,
COLLECTOR'S OFFICE, *Aug.* 25, 1893.

I certify this to be a true copy from the original enrollment now on file in this office.

[SEAL.] L. A. PIKE,
*Deputy Collector.*

(Here follows diagram marked p. 654½.)



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655 UNITED STATES OF AMERICA, } ss:
*District of Oregon,* }

I, Roswell B. Lamson, clerk of the district court of the United States for the district of Oregon, do hereby certify that the foregoing pages numbered 1 to 675, inclusive, contain a full, true and complete transcript of the record of said district court in the cause of the barge "Columbia," etc., as the same appears of record in my office.

In testimony whereof I have hereunto set my hand and the seal of said court at Portland, in said district, this tenth day of April, in the year of our Lord one thousand eight hundred and ninety-four.

[SEAL.] ROSWELL B. LAMSON,
*Clerk United States District Court for the District of Oregon.*

(Endorsed:) Filed April 18, 1894. F. D. Monckton, clerk.

656 In the United States Circuit Court of Appeals for the Ninth Circuit.

BALFOUR, GUTHRIE & CO. ET AL., Appellants,
*vs.*
THE BARGE COLUMBIA, ETC., ET AL. } No. 172.

*Depositions.*

657 In the United States Court of Appeals for the Ninth Circuit.

MALVINA SHORT, Administratrix of the Estate of Marshal B. Short, Deceased; Sven Anderson, Administrator of the Estate of John August Peterson, Deceased, and Balfour, Guthrie & Company, Respondents, Appellants,
*vs.*
THE BARGE "COLUMBIA;" THE OREGON RAILWAY AND NAVIGATION Company and The Oregon Short Line & Utah Northern Railway Company, Libelants and Petitioners, Appellees.

It is hereby stipulated that the testimony of Edward Mackay, James Robinson, P. G. Eastwick and J. N. Fisher, witnesses on behalf of the appellant-, may be taken before C. H. Sholes, notary public, at the office of Williams, Wood & Linthicum, Portland, Oregon, on the 28th day of May, 1894, at one o'clock in the afternoon of said day.

Application to the court, formal notice to respondents, and all matter of form are hereby expressly waived.

658 Said testimony, if admitted, to be received subject to all objections as to relevancy, competency or materiality thereof.

It is furthermore stipulated that the evidence so offered was not in the possession of the appellants and the witnesses known to appellants at the time of the trial of said cause in the district court of the United States for the district of Oregon, and such evidence was not deliberately withheld by appellants at said former trial.

W. W. COTTON,
*Proctor for Libelants and Petitioners.*
WILLIAMS, WOOD & LINTHICUM,
*Proctors for Respondents and Appellants.*

(Endorsed:) No. 172. In the circuit court of appeals for the ninth circuit. In admiralty. Malvina Short, adm., *et al.*, respondents, appellants, *vs.* The Barge Columbia *et al.*, petitioners and libelants, appellees. Stipulation. Filed June 19, 1894. F. D. Monckton, clerk.

659 In the United States Court of Appeals for the Ninth Circuit.

The Barge "Columbia;" The Oregon Short Line and Utah Northern Railway Co., Petitioners and Respondents; Balfour, Guthrie & Co., Malvina Short, and —— Larsen, Administrator of the Estate of Gus Peterson, Deceased, Appellants.

Depositions of witnesses taken before C. H. Sholes, notary public, at the office of Williams, Wood & Linthicum, May 28, 1894, at 1 o'clock p. m., on behalf of the appellants.

EDWIN G. MACKAY.

EDWIN G. MACKAY, being first duly sworn on behalf of the appellants, testified as follows:

Direct examination.

Questions by Mr. FLANDERS:

Q. 1. What is your residence and occupation?
A. I am a ship carpenter, and I live at 88 Tenth Street, Portland.
Q. 2. How long have you lived in Portland?
A. Going on 24 years.
660 Q. 3. What experience have you had as a ship carpenter?
A. I have been at the trade for more than 31 years.
Q. 4. Do you know the barge "Columbia"?
A. Yes, sir.
Q. 5. You may state when you first knew her.
A. Well, it would be 20 years, about that time. I think it was 20 years in May when she was commenced; May or June.
Q. 6. Did you work upon her during her construction?
A. Yes, sir.
Q. 7. You may state what here frames were.
A. Her frames were just common straight fir timber.
Q. 8. Were they natural?
A. No, sir.
Q. 9. Did you construct her frames?
A. I moulded the greatest part of her frames; moulded them by pattern.
Q. 10. Have you ever worked upon the barge since?
A. No, I never worked on her since.
Q. 11. Do you know the extent and nature of the repairs made upon her since her construction?
A. No, only what I hear. I don't know of any repairs at all of my own knowledge, only what I heard the rest of the carpenters talking about.

Q. 12. Have you been engaged in the business of ship carpentering since your residence in Portland?

A. Yes, sir; all the time.

Q. 13. Do you know more or less as to what is going on in your particular business in this city?

661 A. Oh, well, just by hearsay.

Q. 14. Did you ever hear of any considerable repairs having been made on the "Columbia" prior to the repairs done upon her in the summer before she sank in Astoria?

Objected to by counsel for petitioner on the ground that it is incompetent and calls for not the best evidence, and asks the witness in regard to matters about which the witness has already stated he has no personal knowledge, and because the testimony is immaterial and irrelevant.

A. Well, the only repairs I heard that was done on her was new guards.

Q. 15. I don't care for the nature of it, but I am asking you whether you knew or heard of any repairs having been done upon her except the last repairs?

Same objection.

A. No, I never heard of any without it was some little jobs; no general repairs that I heard of.

Q. 16. Do you know whether or not at the time of the construction of the "Columbia" salt was used upon her?

Objected to as incompetent, irrelevant and immaterial.

A. I could not say whether she was salted or not.

Q. 17. Do you know anything about the use of salt as a preservative for timbers?

Same objection as last and because the witness is incompetent to express an opinion.

A. Well, it will make them last for a couple of years longer;

662 it preserves them for a few years longer if they are kept salted all the time; but after the first year or two, after they get wet, it hasn't much effect on it.

Q. 18. As I understand then, after two years or so the effect of salt ceases?

Same objection.

A. Yes, it don't have much effect on it.

Cross-examination.

Questions by Mr. COTTON:

Q. 19. What do you mean by two years? After when?

A. After they are first salted.

Q. 20. What effect does it produce right after they are first salted?

A. Well, it penetrates the timbers and makes them a little stronger;

goes through the timber, and after the timber gets wet, it has no more effect on it at all—gets soggy.

Q. 21. Doesn't that effect of penetrating the timber last during the life of the timber?

A. No, sir.

Q. 22. Why not?

A. It gets soggy and rotten, and sometimes they salt them one year and never salt them afterwards.

Q. 23. That is, all timber gets rotten inside of two years?

A. No, it don't get rotten in two years; it may get rotten in five or six years.

Q. 24. And may not get rotten inside of twenty years?

663 A. Oh, no; it will get rotten inside of twenty years. After they are twenty years old, I don't go much on salt or anything else.

Redirect examination:

Q. 25. How long does the usual quality of fir timber used in the construction of steamboats and barges last?

Objected to on the ground that it calls for the witness's opinion upon an ultimate question of fact in regard to which personal evidence of witnesses has not been received, also on the ground that the witness is incompetent to express an opinion, and the testimony called for is incompetent, irrelevant and immaterial.

A. Well, it lasts from 10 to 12 years, and after that they get very soft. Some fir lasts longer and some not so long. There is some that gets rotten at seven years, but the average is generally 10 to 12 years.

(Signed) EDWIN G. McKAY.

JAMES ROBINSON, being first duly sworn on behalf of the appellant, testified as follows:

Direct examination.

Questions by Mr. FLANDERS:

Q. 1. What is your name, residence and occupation?

A. My name is James Robinson; I am a ship carpenter by occupation; residence, 409 Irving street, Portland.

Q. 2. How long have you lived in Portland?

A. About a quarter of a century or a little over.

Q. 3. How long have you followed the occupation of a ship carpenter?

664 A. I have followed it since I was 16 years old.

Q. 4. Have you been engaged in that business while a resident of Portland?

A. That is all I have done in Portland.

Q. 5. Do you know the barge "Columbia"?

A. Yes, sir.

Q. 6. Did you work upon her during her construction?
A. Yes; I helped to build her.
Q. 7. Have you been acquainted with the barge since that time?
A. Well, I worked several times on her at small jobs, off and on.
Q. 8. Did you work upon her during her repairs in the summer before she was wrecked in Astoria?
A. I don't remember whether I did or not.
Q. 9. The last time, I mean?
A. Oh; this last time! Yes, yes. I worked upon her.
Q. 10. Do you know whether or not salt was used in her construction?
A. I think when she was built there was salt put in her, for instance the clamp and shore stakes and planks outside; there was tons of salt put in her, about 28 inches from the deck, and that was all. I think there was salt put in her.
Q. 11. You may describe the character of the repairs that were done upon the "Columbia" in the summer when she was last overhauled?
A. I could not say anything more than just what I was doing myself.
665 Q. 12. Well you may describe that.
A. It was a hurried job, and just where I had been to work we repaired her guards in pretty good shape, so far as I know, and that is about all I can say about her.
Q. 13. How long did you work on her?
A. Somewhere inside of two weeks; I don't think I was over—I don't know whether I was two weeks; I wasn't more anyway, and then I was taken off and put onto something else.
Q. 14. Do you know how long they worked upon her after that?
A. No, I don't know how long they worked upon her after that, but of course I was taken off when the work was getting pretty well along so that they didn't want so many on and I don't think they worked very long on her after that because they were getting virtually wound up and took some of us off and put us on something else. I believe that is all I worked there then, I didn't work any more after that.
Q. 15. Did you state what you did yourself upon her during that time?
A. Well, I only worked on the one job, and that was putting in beams and working upon the guards putting on nosing and such like.
Q. 16. Where did you put in the beams?
A. All along both sides of her. I know I commenced aft putting in beams and worked towards forward and worked all the way forward on one side, and there were men on the other side putting in beams and then we put on the covering board on the one
666 side in the gang I was in and then we worked altogether putting a nose in her.
Q. 17. Was her deck taken up inside the house?
A. Not when I worked on her, no.

Q. 18. How did you put your beams in? Alongside the old ones?

A. Oh, yes, alongside of the old ones. Where there was an old one outside that was good we put a beam alongside of it and let it run in and double inside and let them run across. You know there was stringers and we let them go over these stringers and put them in far enough. A good many beams were all gone and had to break them right off or cut them off and then put in new beams.

Q. 19. Do the beams extend from guard to guard?

A. Oh, no, they don't put in beams that way, right across; only put them in pieces; that is, put them in alongside the other because the beams were all good from the gunwale in; being covered with the house they were kept sound and then they were put in and fastened to the old beams.

Q. 20. Were any new stanchions put in?

A. I didn't see any new stanchions put in while I worked on her.

Q. 21. Do you think there were any put in after you worked upon her?

A. I don't think there was, although I could not say. I don't think there was anything done as near as I know, although I could not swear to it, because a few days afterwards, after I was off of her, I used to go aboard of her now and then to get some things, some tools, or something.

667 Q. 22. Did you examine the condition of the floor of the barge?

A. I never paid any attention to that at all.

Q. 23. Did you examine the condition of her frame?

A. I never paid any attention; had no time to look at the like of that. We had to spike those beams in and come right out again, and we go on with the work.

Q. 24. Of what material was the barge "Columbia" constructed?

A. I think she was constructed of good material; it was fir.

Q. 25. What is the life of fir timber used in boat-building, the average life?

A. That depends on the care taken of her. I don't think there is any timber here that we have ever had a right test of to tell how long the life is. I see boats six years old that are very bad, and I have seen boats twelve and fourteen years old that had good care taken of them that were very good, I think—that is, if there was good care; but I don't think there is any such care taken of anything here without it is Mr. Kamm, with the Lurline and his boat. He takes pretty good care of his boats, so far as I know.

Q. 26. Do you know as to the care that has been taken of the boats of the O. S. N. Co. and the O. R. and N. Co. for the last ten years?

Same objection.

Q. 27. Do you know as to the care that has been taken of the boats generally of the company and of this boat in particular?

668 Objected to on the ground that testimony called for is incompetent, immaterial and irrelevant, the witness has shown no personal knowledge and it is incompetent to express an opinion, and the matter referred to is not a matter to be determined by expert testimony.

A. I think there has been very poor care taken; very poor care.

Q. 28. Do you know of the use of salt as a preservative for timber, Mr. Robertson?

A. I think so; I think salt is a good preservative.

Q. 29. I asked you if you knew of salt being used as a preservative?

A. I have known salt being used in a good many cases in boats.

Cross-examination.

Questions by Mr. COTTON:

Q. 30. Where did you say you nailed the new beams to?

A. The new beams were fastened to the old ones and then to the gunwale, of course; built to the gunwale, to the shore stake and clamps on the inside and then to the old beams besides.

Q. 31. These beams you put in were just the beams extending outside the house?

A. Yes, sir.

Q. 32. Not inside the house?

A. Oh, they were not inside, of course.

Q. 33. Those inside the house were good, you say?

A. Yes, but the new ones were doubled in on those just the same as you would double that in; that stands out and this goes in by the old one, lapped together.

Excused.

(Signed) JAMES ROBERTSON.

669 PHILLIP G. EASTWICK, being first duly sworn on behalf of the appellants, testified as follows:

Direct examination.

Questions by Mr. FLANDERS:

—. 1. What is your residence and occupation?

A. Portland, Oregon; civil and mining engineer.

Q. 2. Mr. Eastwick, what experience, if any, have you had in boat-building, in the construction of boats and barges and in the operation, if any, of the same?

A. I have designed and superintended the construction throughout of the ten barges that are now carrying stone to the mouth of the Columbia river.

Q. 3. Did you ever have any connection with the construction of the jetty at the mouth of the Columbia?

A. Yes, sir; three years in local charge of the work; between three and four years.

Q. 4. Did that include the handling of barges at Fort Stevens?

A. Yes, sir.

Q. 5. What were the barges which you speak of as designing and superintending the construction of? What were they designed and used for?

A. They were designed for carrying stone to the jetty from the quarries up the river.

Q. 6. What was the tonnage capacity of those barges?

Objected to as immaterial and irrelevant.

A. Six of them would carry about 300 tons; four would carry 450 tons.

670 Q. 7. Did you have anything to do with the operation of those barges?

A. Yes, I had to do with the operation of the four first that were built.

Q. 8. Are you acquainted with the character of the bottom of the Columbia river at Astoria and vicinity?

A. In a general way I am.

Q. 9. You may state whether or not you ever made a survey to ascertain the character of the bottom of the river at the inside of the Union Pacific dock at Astoria?

A. Yes, sir; I have.

Q. 10. You may state what you did there and when you made such examination.

A. I made an examination about six weeks or two months ago.

Q. 11. Did you sound as to the depth of the water there?

A. I took full and complete soundings of the eastern inner dock at the Union Pacific wharf; that is, such complete soundings as would be taken to develop the shape of the surface of the bottom.

Q. 12. By the eastern part you mean the dock east of the roadway?

A. Yes, east of the roadway.

Q. 13. Is that the portion of the dock at which the barge "Columbia" lay?

A. I don't know; I have no evidence except certain photographs which I found there which led me to believe that it was the place: photographs illustrating the barge "Columbia." I say I have no evidence but that; I have other evidence by inquiry.

672 Q. 14. That is, that portion of the dock which the photographs of the "Columbia" show her to be lying at after her sinking?

A. Yes, sir; the part that I developed.

Q. 15. Did you make a plat of such soundings showing the depth of water at the dock?

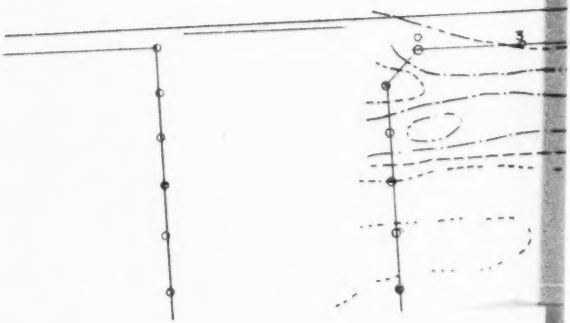
A. Yes, sir.

Q. 16. Is this the plat which I show you?

A. This is the plat, yes, sir.

FOLD OUT IS TOO LARGE TO BE FILMED

UNION



Counsel for the appellants offers the plat in evidence and the same is attached hereto and made a part of this deposition as Appellants' Exhibit "A."

(Here follows diagram marked p. 671.)

Counsel for the petitioner objects to its introduction on the ground that it is irrelevant, immaterial and incompetent, there is no evidence introduced as to the state of the water at the time of the soundings were made as compared with the water at the time the barge "Columbia" sank and there is no evidence of the exact date when the soundings were made or of the state of the tide.

Q. 17. Can you give the date at which those soundings were made?

A. Yes, sir.

Q. 18. What was that date?

A. The bulk of them were made April 7th; a few were made on April 8th, and a few later soundings were made April 9th.

Q. 19. You may state whether or not your soundings were made with reference to and calculated upon with reference to any particular stage of water.

673 A. These soundings were all taken at various stages of tide, but the tide gauge being noted continuously during the soundings, and the time of soundings being noted. The depths were all referred to the zero or low water of the tide tables.

Q. 20. These curves on the map indicate what?

A. Those indicate the depth of water, reduced to zero, of the coast survey charts or tide tables.

Q. 21. What does this curve marked "two feet" mean?

A. It shows that the bottom along that line is two feet below the level of the water when it is at zero of the gauge, the zero of the tide tables.

Q. 22. Three feet indicates what?

A. That indicates a depth of three feet along that line.

Q. 23. Four, five, six and seven feet?

A. Those indicate the same.

Q. 24. Mr. Eastwick, you may state whether or not the location of the doors of the warehouse are shown upon this map, and, if so, point them out?

A. Door 22 is marked there by that heavy line; door No. 23 is marked there also.

Q. 25. What is the location of that door with reference to that photograph?

A. There is No. 23 door, and this is No. 22 door, both of them slide open.

Q. 26. Are these the doors opposite to the barge as shown by the photograph?

A. This is door No. 23 opposite to about the middle of the barge, near the stern; No. 22 is opposite the bow of the barge.

677 Q. 27. You may state whether or not you based upon the soundings you made, any maps showing the cross-sections of the river bottom adjacent to the dock.

A. Yes, I made cross-sections showing the surface of the ground on lines perpendicular to the inner edge of the wharf at each one of the high piles as illustrated in the photograph. You will notice there are a certain number of piles that are higher than others. Those high piles I have marked and numbered on the map consecutively by these numbers.

Q. 28. By the numbers on the line adjacent to the south margin of the wharf?

A. Adjacent to the south margin of the wharf, yes.

Q. 29. You may state if you have those cross-sections, and if so, you may produce them.

A. Those cross-sections are on two sheets marked "profiles."

Q. 30. Marked "profile sheet No. 1," and "profile sheet No. 2"?

A. Yes, sir; which I produce herewith.

Said profile sheets are offered in evidence on behalf of the appellants and marked "Exhibits B and C," and made a part of this deposition.

(Here follow diagrams marked pp. 674 & 675.)

Same objection to each of them as heretofore entered to "Exhibit A."

Appellants also offer in evidence the photograph showing the location of the barge "Columbia" with reference to the dock and the same is marked "star 21" and "Appellants' Exhibit D."

(Here follows diagram marked p. 676.)

Q. 31. You may explain this profile by showing it with reference to the dock.

678 A. This line marked zero at the top of each profile—you will notice that each one of these is a separate profile, between the black horizontal lines. The number marked zero corresponds to the *the* line of the wharf. These intervals from that line to that one represents a foot.

Q. 32. Where would the south margin of the dock be?

A. The south margin of the wharf would be along the line of zero at the right-hand side of the profiles. The position on that line is indicated by the figures marked "pile 3, 6, 8, 10," and so on.

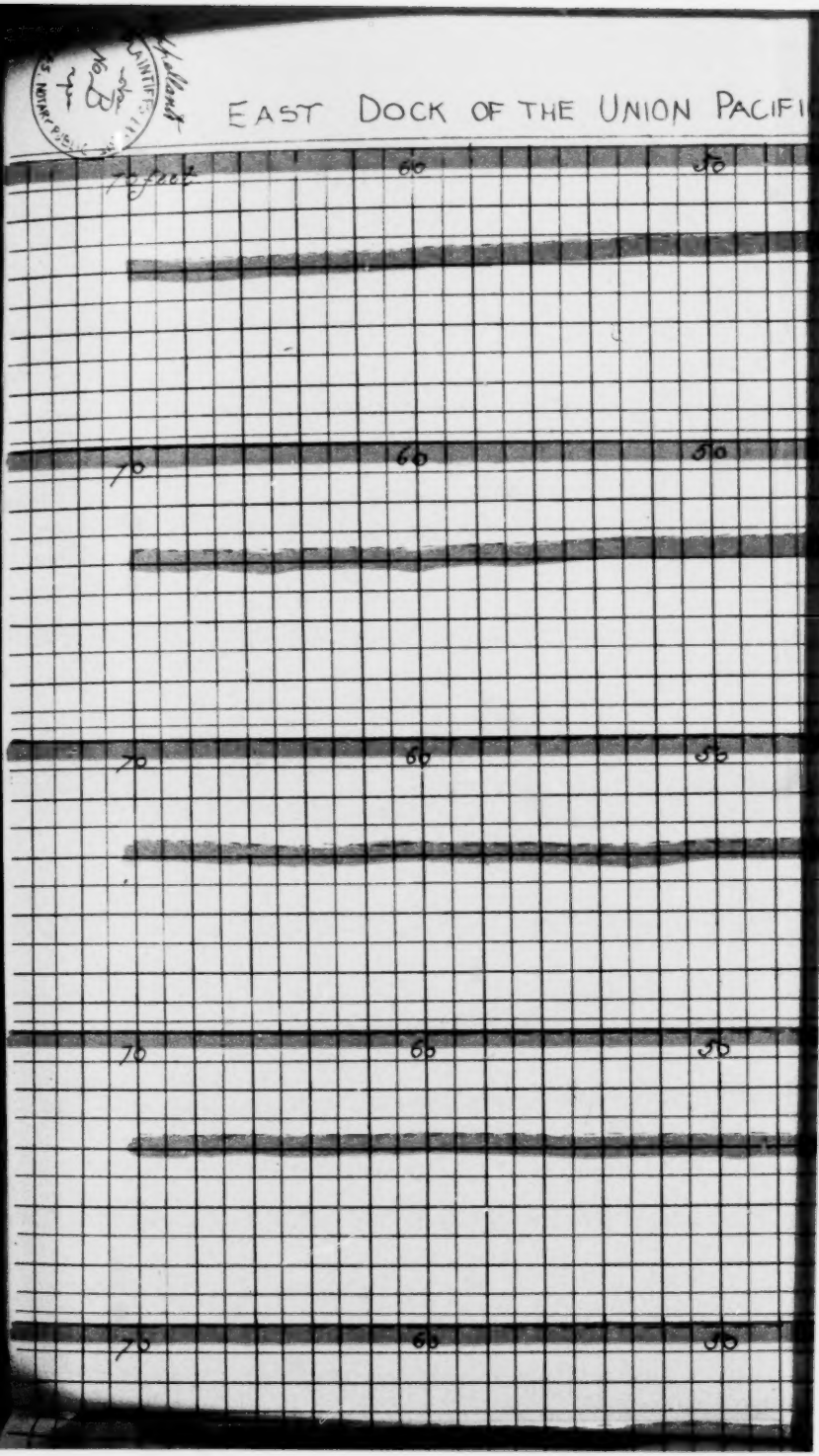
Q. 33. Do those correspond with the numbering on Exhibit A?

A. These correspond with the numbering on Ex. A. The figures in the horizontal line at the top of each profile indicate the distance in feet from the south margin of the wharf.

Q. 34. That would be out from the dock?

A. Out from the dock towards the shore.

Q. 35. Now you may explain the curves indicated upon this profile?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FOLD OUT IS TOO LARGE TO BE FILMED

No. 2137-14
The Barge
"Columbia"
p. 676

Appellant's Exhibit "D."

A. These profiles are drawn to what we call a natural scale. That is, the horizontal scale is exactly the same as the vertical and shows on a reduced scale without distortion the actual condition of the profile of a line drawn from the pile indicated perpendicularly to the line of the wharf. These lines are shown on the plan Ex. A in pencil.

Q. 36. These, then, furnish, as I understand, a description
679 of the depth of the water at distances of 10, 20, 30 and 40 feet towards the shore south from the dock?

A. At all distances between zero and 70 feet from the dock, and at intervals along the dock, varying from 15 to 30 feet east and west.

Q. 37. What character of bottom did you find there, Mr. Eastwick?

A. I found the bottom of soft mud on top, increasing in stiffness or density as we got down.

Q. 38. How deep did you sound the bottom—that is, how deep into the mud did your sounding rods go?

A. My sounding rods went from three to four feet.

Q. 39. Did you or did you not find a uniform character of bottom extending north and south, and east and west?

A. I found a uniform condition of affairs, broken here and there by hard obstacles, which my sounding rod indicated to be in some cases wood; in other cases a resisting substance which had the elasticity of grain bags. I punched through two of those grain bags with a pointed rod I had, and then the rod went easier.

Q. 40. Did you find the same character of mud beneath the grain bags which you punched through with the pointed rod as in other places?

A. I could not get through beneath the grain bags; it was hard work to get the rod down when I came to an obstacle of that kind.

Q. 41. You may state whether or not, in your connection with the jetty, you ever knew of your barges going ashore in the Columbia river, in the vicinity of Astoria?

680 A. Yes, sir.

Q. 42. Is, or is not grounding an incident of navigation with barges upon the Columbia river?

Objected to as immaterial, irrelevant and incompetent.

A. It has been in my experience.

Q. 43. Should or should not a barge be so constructed as to be able to hold her load when aground?

Objected to as immaterial, irrelevant and the witness is incompetent to express an opinion and the testimony called for is incompetent and not a question to be determined by expert testimony.

A. I think I can say decidedly yes to that.

Q. 44. Mr. Eastwick, you stated about your own barges, as I understood, having been aground in the Columbia river in the vicinity of Astoria. Did or did they not hold their loads when so aground?

Objected to as immaterial, irrelevant and the fact that other barges sustained the loads is no criterion as to what constitutes seaworthiness.

A. Yes, they did; on one occasion that I recall, we beached a loaded barge on the mud flats in Young's bay and repaired damages that had occurred to her by bumping on the sands at Fort Stevens.

Q. 45. How much of a load did that barge carry at the time?

A. She had in the neighborhood of three hundred tons, two seventy-five to three hundred tons.

Q. 46. Did she have any water in her hold while so beached?

A. Yes, sir; she was making water.

681 Q. 47. Did she carry her load or hold her load?

A. Yes, sir. The barge was beached and leakages stopped and floated off again at the next tide and taken to the jetty and the cargo discharged and the vessel put into service again as usual.

Q. 48. Was the bottom of the river at that point similar to the bottom of the river which you have spoken of here as having sounded and surveyed?

A. Practically so, although I am inclined to think it was a little less uneven than this; more uniform inclination.

Q. 49. Mr. Eastwick, is the bottom of the river adjacent to or south of the Union Pacific dock so uneven as in your opinion as to make a barge rest unevenly when lying on the bottom?

Objected to as immaterial, irrelevant, and not the best evidence and not a question for expert testimony or for opinion evidence.

A. It would strain a loaded barge somewhat, settling down; would put it out of its original shape. That will happen in almost any case of a barge settling unless the ground happens to be just of the right shape.

Q. 50. To such an extent as in your opinion to make a seaworthy barge loaded when resting on the bottom, dump and ruin her load and break up?

Objected to because it is not a question for opinion evidence; the witness is incompetent to express an opinion and the testimony called for is irrelevant and immaterial, and on the ground that the facts supposed in a hypothetical question are not the facts shown by the evidence.

682 A. The character of the bottom was not such as to cause a seaworthy barge to break up in that way.

Counsel for petitioner moves to strike out the witness' answer, on the ground that it is not responsive to the question.

Q. 51. Should a barge used for the purpose of navigating the Columbia river be so constructed, as when loaded, resting on the mud, making water, and having a list, hold up her load?

Objected to as incompetent, irrelevant and immaterial, and because it is not a question for expert evidence.

A. A barge for that duty should be constructed to withstand reasonable or ordinary accidents that are likely to occur without serious damage to her cargo, or the hull of the vessel itself.

Q. 52. Do you know the life of fir timber?

A. I do.

Q. 53. Used in vessels building in this vicinity?

A. Yes, sir.

Q. 54. What is the life of such timber?

Objected to as immaterial, irrelevant and incompetent.

A. That depends very largely upon the care which is taken of the timber. The care to preserve it. A well-ventilated ship, with the timbers kept dry and clean, will last longer than where such precautions are not taken. The timbers that are put in these barges begin to get soft and rotten in from six to eight years; sometimes sooner than that; and my judgment is, that under the con-

683 ditions surrounding boats and barges generally, in navigating the Columbia, that eight to ten years would be considered the average life of most of the timbers of a boat like that. They would require extensive repairs before they were eight or ten years old. At twelve or fourteen, barges would be so far gone as to be less worthy of repair, that is, barges would not be in fit condition to carry anything like a full load.

Counsel for the petitioner moves to strike out the witness's last answer on the ground that the testimony is immaterial and irrelevant and the facts stated are not the subject of expert or opinion evidence.

Cross-examination.

Questions by Mr. COTTON:

—. 55. I understand, Mr. Eastwick, that these profile sheets, Nos. 1 and 2 are to be connected to each other in order to make the profile complete?

A. Yes, sir; they are continuous as indicated by the *p*ile-marks.

Q. 56. And that the perpendicular and horizontal scales are both the same?

A. Are both the same, giving a profile which is not exaggerated.

Q. 57. That is, it is a natural scale?

A. Yes, sir.

Q. The same scale used in both directions?

A. Yes, the same horizontal as perpendicular.

Q. 58. But the red feet marks marked on the profiles across their vertical length indicate the depth below the zero mark?

A. Yes, sir; the zero mark is marked "L. W."

684 Q. 59. That is low water; at what stage of water?

A. It is low-water depth by the Coast Survey and by the Government tide tables; it is the mean of the lower low waters. The tide falls lower than that at times, but that is the adopted plane of reference for all surveys.

Q. 60. Does that take into consideration the height of the river itself—the height of the water in the river?

A. Well, I don't know as I understand your question exactly. There is a fixed plane—a plane of reference fixed by the Coast Survey authorities after a long series of observations.

Q. 61. Then the map which you have drawn there is not the actual depth of water which you found in April, '94?

A. No, sir; not the actual depth.

Q. 62. Neither is it the actual depth which might have been found there in October, 1892?

A. No, sir; if there is any accretion or washing out that I know nothing of.

Q. 63. But it would not be the actual depth of the water at any time, except at the time when the conditions prevailed which have been adopted by the Coast Survey for their zero mark?

A. Yes, sir.

Q. 64. That is, the actual depth?

A. We have, during the day, all manners of depths, according to the rise and fall of the tide.

Q. 65. And in addition to that, you have, during the year,
685 not only the variations of the tide, but the variations of increased water in the Columbia river, on account of freshets or rises?

A. Yes, sir.

Q. 66. So that the only thing you intend to indicate by the marks is simply the relative depths with reference to each other. Is not that it?

A. Not only that, but also the depths with relation to the fixed plane of reference as indicated by the gauge on the Union Pacific dock and by the Government gauges at the Wilson dock.

Q. 67. But the depths mark only indicates the actual depth when the actual height of water is at this zero mark?

A. Yes, sir.

Q. 68. Now, referring to Ex. A, the curves in the brown lines indicate what?

A. Those indicate lines of uniform depth tracing in one of the lines, as for instance the six-foot line; supposing you were to travel along that line you would neither rise nor fall, you would travel on a level in either direction; and similarly for any of the other lines.

Q. 69. The plain spaces, then, between the lines vary from the depths indicated by the lines bordering each of the planes?

A. Yes, sir; as for instance from the three-feet contour to the four-feet contour the ground slopes from a three-feet depth to a four-feet depth.

Q. 70. These soundings, you say, were made in April, 1894?

A. Yes, sir.

686 Q. 71. What is your sounding rod made of, that is, what is it?

A. I had a wooden sounding rod, a stick. I had one an inch square, and broke that and got one an inch and a half square, and in addition to that I had another sounding rod made out of tougher wood with a sharp point.

Q. 72. Which is the one with which you undertook to detect the depth of the bottom?

A. I used the inch and a half rod.

Q. 73. That is, I mean the depth of the mud?

A. The depth of the mud I ascertained with the inch rod.

Q. 74. The pointed one?

A. No; also with the pointed rod. I used them alternately. I went out equipped with all of them so as to get the best information that I could develop.

Q. 75. You ascertained the depth of the water with the inch and a half staff, and the depth of the mud with the pointed rod?

A. Well, I used the same rod for the same purpose. I would take the depth of the water and then with the full strength of a stout man pushed it down into the mud and noted the depth of penetration in the mud.

Q. 76. These stone barges were built how many years ago?

A. The first barges were built in 1885, four of them; six more of them were built in 1888.

Q. 77. Are they still in use in the river?

A. Yes, sir, they were up to the time of the work closing down, about two months ago.

687 Q. 78. What was their condition when you stopped using them?

A. I have not had anything to do with the first four since 1888, nor have I had anything to do with the last six since they were built. I had the building of them.

Q. 79. When did this barge go ashore that you spoke of?

A. The stone barge?

Q. 80. Yes.

A. In the spring of 1888 or 1887.

Q. 81. How long were you connected with the work there?

A. I was connected with the work three years, from 1885 to 1888.

Q. 82. During that time these four barges were in use all the time?

A. All the time when the stone delivery was going on.

Q. 83. Did they extend more or less continuously throughout the year?

A. No, it was broken at times. The barges were at times laid up. They were in use for four or five months in the latter part of 1885. They were laid up during nine months of 1886; they were put into service again in the fall of '86 and continued in operation with very little interruption up to the time I left that work in April, 1888. That from my own personal observation—from my intimate knowledge subsequently they have continued in operation transporting stone every year since.

688 Q. 84. These boats are ordinarily used in connection with a towboat, are they not, in making trips?

A. They are moved by towboats, yes.

Q. 85. And generally all moved at the same time, three or four of them together?

A. No, sir; when I had charge of them there was rarely more

than two moved at a time, sometimes but one. I don't recollect an incident where there was more than two of them moved at a time; but since then I understand, although I don't know positively, they have been moving them in larger numbers; the fact that they had more barges to move.

Q. 86. What is the character of those barges, are they round or square bottomed?

A. They are what is called the model barge. They are rounded at the bilge and built like a ship at the bow and stern—sharp; what is technically called a model barge.

Q. 87. Did you select that character of model as a proper and suitable model for use on the Columbia and Willamette rivers?

A. Yes, sir.

Q. 88. Do you think that was as good as any or better?

A. I thought it was the best. The first barges were improved upon in subsequent-barge building. The last four barges that we built were matters of considerable study, and in modeling the shape, I cut out the model myself.

Q. 89. What was the reason for the necessity of this study?

689 A. There were a great many reasons. One of them was to make the barge of given dimensions that would carry the largest possible cargo and still move through the water rapidly, offering as little resistance to the water when she was unloaded, and when she was loaded, owing to the small speed we could make the barges bluffer and fuller above the water line without very materially increasing the resistance to its traveling through the water.

Q. 90. Where did these barges carry their loads?

A. On deck.

Q. 91. They have a hold space underneath them?

A. Yes, sir.

Q. 92. About how high above the water do they carry their load ordinarily when loaded?

A. The vessel was loaded down to within one foot or one foot and a half of the top deck. It was calculated to load them down to within a foot of the top of the deck.

Q. 93. What was the height of these barges from their deck to the bottom of the keel?

A. The six barges that were built had a depth of hold of six feet. The four last that we built had a depth of hold of seven feet. I won't be certain exactly about those dimensions as I do not carry them in my mind, but that is approximately their depth of hold.

Q. 94. There was considerable time and attention paid to the construction of those barges so far as strength was concerned, was there not?

A. Yes, sir.

690 Q. 95. What you might call unusually high-class barges?

A. No; I would not call them such. There was no more work put on them than I would consider essential for the duty they had to do.

Q. 96. Their duty was almost wholly in carrying stone?

A. Entirely so.

Q. —. How was the stone laid on?

A. It was placed on by means of derricks and removed in the same way.

Q. 89. Irregular sized shapes and pieces?

A. Yes, sir.

Q. 99. You say the carrying capacity of those barges was about 350 tons?

A. 300 tons for the first six and 450 tons for the last four. Those are approximate figures.

Q. 100. Whereabouts was this barge beached that you referred to?

A. It was beached a short distance up from the point there below Astoria, in Young's bay. I do not recollect the name of the point.

Excused.

(Signed) PHILLIP G. EASTWICK.

J. N. FISHER, being first duly sworn on the part of appellants, testified as follows:

Direct examination.

Questions by Mr. WOOD:

Q. —. What is your residence and occupation?

A. I reside at 528 Thurman street, in Portland, Oregon; am a master and pilot by occupation.

691 Q. —. Have you been engaged in boating on the Willamette and Columbia rivers?

A. Yes, I have; I have been at it since 1856.

Q. 3. That has been your occupation all that time?

A. Yes, sir; until within the last few years, when I quit the river—that is, I have been on it occasionally, but have not made it a regular business for the last few years.

Q. 4. Have you ever seen barges and steamboats built for that service and superintended them?

A. Well, might say I superintended some for Mr. Weidler. Those are the only ones. I was there nine years and a half.

Q. 5. George Weidler of the Willamette Steam Mills Lumbering and Manufacturing Company?

A. Yes, sir.

Q. 6. Is it a usual and natural incident of navigation on the Columbia and Willamette rivers for barges to get aground or to be beached?

A. Well, occasionally they do. If a barge was leaking and they think it prudent sometimes to beach it rather than unload it, they beach it. It is owing to the circumstances in regard to that. They usually get aground.

Q. 7. Do they get aground accidentally sometimes with their loads—that is, not purposely beached, but get aground by accident?

A. Oh, yes.

692 Q. 8. State whether or not, in your opinion, a properly constructed and seaworthy barge for the navigation of these rivers ought to be able to carry her load when beached or grounded as well as when afloat.

Objected to on the ground that the evidence called for is immaterial, irrelevant, and incompetent.

A. Well, that is owing a great deal to the bottom which she is beached on. If she is beached on a level bottom she ought to carry her load. If she is beached on a rocky bottom it would naturally knock holes in her and let in the water.

Q. 9. Are you familiar with the bottom of the Columbia river on the inside of the O. R. & N. dock, at Astoria?

A. I used to think I was pretty familiar with it; have been there a good many times, and sounded a good many times with lead, and also with pole.

Q. 10. What was the character of that bottom?

A. It is soft in there, if I remember right. In next to the shore, from the dock, there are some boulders, but take it out next to the dock I never found any; it was a soft bottom.

Q. 11. What you would call a mud bottom, is it?

A. Yes, sir.

Q. 12. Ought a barge to bear up her load when settling onto that bottom?

A. Yes, sir; I should think she would.

Q. 13. Do you know this barge "Columbia," or did you know her?

A. I am not personally acquainted with the barge. I remember the barge, but I never had much to do with her.

Q. 14. Did you ever inspect her during the latter part of her life?

693 A. No, sir; I did not.

Q. 15. Are you familiar with the life of fir timber used in barge and boat building and construction on Columbia river?

A. Yes, I think I am. I have been connected with it all my life, might say.

Q. 16. What is the average life of such timber in such use?

Objected to as incompetent, irrelevant, immaterial, and the evidence called for is not a matter of expert or opinion evidence.

A. The life of fir timber in a boat is owing a great deal to the care that is taken of it. The care they generally take of these boats, the life of that timber according to that would be about from five to nine years—that is, between wind and water—that is, where the boat lies when she is loaded, where her water line would be. That is where a boat usually gives out first, and the dampness which collects naturally makes them rot there much quicker than they do elsewhere. They would last from five to nine years.

Q. 17. How can this life of the timber be prolonged, if at all?

A. Well, I practiced considerably on prolonging the life of this timber, and the only thing I have ever discovered which pro-

longed it was salt. When I had the "Ordway" built I superintended her, and also the barge "Monarch." We put 25 tons of salt in the "Ordway." We boxed her timbers above and put the salt in up next to the deck all around. Of course, as that evapo-
694 rated it went through all the timbers. Then we did that with the "Monarch," too. Then when the "Wanderer" was built we tried the experiment of whitewash, and the consequence was that the "Wanderer" was rotten and rebuilt before the "Ordway" was anywhere weak at all.

Q. 18. About how long will this salting prolong the life of timber?

A. Well, it is a hard question for me to answer how long it would. That is one instance which I noticed. I believe the "Ordway" has been rebuilt since I quit working for the company; retimbered, built over.

Q. 19. With timbers well salted in a barge working on this river, at what period ought she ordinarily to be repaired and repairs to be kept up after that?

Objected to as irrelevant, incompetent, and immaterial, and the evidence called for is not matter of expert or opinion evidence.

A. Well, that is rather a peculiar question for me to answer. We generally look after our vessels, and when the timbers give out we have to put in new ones. That is about the long and short of it.

Q. 20. There isn't any rule, then?

A. No, there is no rule laid down that I know of.

Q. 21. About what would the life of timber be when taken care of with salt?

A. Well, I suppose it would last as long again as though it was not.

Q. 22. Do you know what the age of the "Columbia" was?

A. I think she was between 16 and 18 years old, if I remember right.

695 Q. 23. Would repairs put upon a boat of that age constitute her as good as when she was a new-built boat, and capable of enduring the same strains and carrying the same load?

A. That would be owing a great deal to the amount of repairs put on her. She would have to be retimbered and a great many new plank put in her. I consider a boat of that age altogether unseaworthy for carrying a load without being all retimbered, and planked around between wind and water anyhow.

Q. 24. All retimbered, do you mean? Practically rebuilt?

A. Yes, practically rebuilt. Of course, the bottom I consider sound; the bottom where it is below water dosen't rot, it very seldom rots out, but above water it will last twice or three times as long as it will between wind and water where it is continually wet and dry.

Q. 25. You think then a boat of that age, by the time she reaches that age, ought to be practically rebuilt in this weak line?

A. Yes, she would have to be practically rebuilt in that weak line. I should not consider her safe for business.

Q. 26. You say that you knew the barge "Columbia," to a certain extent?

A. I knew of her and have been aboard of her, but I never paid a great deal of attention to her.

Q. 27. You know of her and about her build?

A. Yes, sir.

Q. 28. I will ask you your opinion, if that boat was entirely
696 stanch, sound and seaworthy and was lying on the inside of the O. R. & N. dock at Astoria loaded with wheat and the tide ebbing until she settled in the mud, whether or not by a mere list or careening over on one side she ought to have collapsed and gone to pieces, or whether she should not either have dumped her load in the water without collapsing in her hull, or have borne it up, one of the two?

Objected to as leading and the evidence called for is objected to on the ground that it is immaterial, irrelevant, incompetent, and the facts supposed are not the facts shown by the evidence.

A. You mean a barge lying alongside the dock and not next to shore?

Q. 29. Yes, alongside the dock.

A. Well, I should think a barge laying there loaded ought to carry her load perfectly safe if she was in good seaworthy condition for this reason: the tide does not ebb out enough there to leave the barge entirely dry, and the mud being soft she would naturally settle right down in it bodily and stand there.

Q. 30. Suppose the facts to be that she commenced to settle into the mud upon practically an even keel, and she was loaded with a full load of wheat in sacks piled up inside of her deck-house about six sacks high, I think, at least a full load of wheat.

A. They usually pile them from six to nine.

Q. 31. Well, it was not less than six and may have been eight, but say about six sacks of wheat high piles up on her deck inside the deck house, and she settled down upon practically an even keel, and all of a sudden, as the water left her, she took a lurch in-
697 shore and apparently struck with a blow on her bilge and collapsed entirely. Now I will ask you whether or not, assuming the bottom to be as you have described it, if she had been thoroughly sound and stanch in her timbers, any blow could have been received from water or mud or anything of that kind that could have broken her up in her hull and caused a complete collapse.

A. No, sir; she should have dumped her cargo. That is my opinion of it.

Q. 32. I will ask you whether a barge that is sound and stanch for the navigation of the river, in her hull, ought to be able to dump her cargo through her deck-house, even tearing the deck-house off, without breaking up her hull?

Objected to as incompetent, irrelevant and immaterial, and the testimony called for is incompetent, and the witness is incompetent to express an opinion.

A. Yes, sir.

Cross-examination.

Questions by Mr. COTTON:

Q. 33. How old was the "Ordway" when you last knew her?

A. About eight years old.

Q. 34. You say it would not be any great strain on a barge to have it tilted over on its bilge with a cargo of 500 tons on it?

A. Of course it would be a strain.

Q. 35. Would it not be a very great and severe and unusual strain?

698 A. Yes; it would be an unusual strain, but then she ought to dump her cargo in place of breaking up.

Q. 36. Would not dumping her cargo depend on how far she tilted?

A. Yes, sir; of course she would have to tilt quite a ways to dump her cargo.

Q. 37. She could fetch up on her bilge long before she would tilt that far?

A. Yes; her bilge would fetch up before she would tilt that far on anything like a level bottom as that is down there.

Q. 38. Suppose, when the barge was sinking, she had listed against the dock, so that one side of her was being supported by the dock. Do you think it was proper handling of the barge to list her away from the dock?

A. Well, I should not list her away from the dock; I should let her rest against the dock.

Q. 39. She would sustain much more of a load listed in that way than listed away from the dock supporting herself?

A. Yes, sir; because I should think the dock would help hold her up on an even keel.

Q. 40. She would support certainly much more on an even keel than when listed?

A. Oh, yes, sir.

Q. 41. These barges are not intended, are they, to support much pressure when listed, but are capable of supporting a great deal more pressure when upon an even keel? Is not that so—that is, when resting upon the bottom?

699 A. Well, when we are building a barge or boat, we do not suppose we are to build her to go overland or anything of that kind, and it is a natural consequence she would stand more, as long as she is on an even keel than she would when she is listed. We are not supposed to build them to run on the ground, although we do it frequently. I have been high and dry time and again down in the bay, with boats, but not with barges.

Excused.

(Signed) J. N. FISHER.

UNITED STATES, }
*District of Oregon,* } ss:

I, C. H. Sholes, notary public for Oregon, hereby certify that the depositions of the witnesses Edwin G. McKay, John Robertson, Phillip G. Eastwick, and J. N. Fisher, on behalf of the appellants in the above-entitled case, were taken before me at the office of Williams, Wood and Linthicum, in the city of Portland, on the 28th day of May, 1894, between the hours of one and five o'clock p. m. of said day, by consent of counsel for the respective parties; Messrs. C. E. S. Wood and J. C. Flanders appearing and examining said witnesses on behalf of the appellants, and Mr. W. W. Cotton appearing and cross-examining said witnesses on behalf of petitioner-; that by agreement between said counsel the witnesses were allowed to sign the shorthand notes of their respective depositions and the signing and reading of their transcribed depositions was waived. I further certify that said
700 witnesses were each duly and legally sworn by me to tell the truth, the whole —, and nothing but the truth in said cause. I further certify that four exhibits were offered and introduced by counsel for the appellants in connection with the examination of Phillip G. Eastwick, which are marked "Appellants' Exhibit- A, B, C, and D," and hereto attached.

In testimony whereof, I have hereunto subscribed my name and affixed my notarial seal this 8th day of June, 1894.

[SEAL.] C. H. SHOLES,
*Notary Public for Oregon.*

(Endorsed:) Filed June 19, 1894. F. D. Monckton, clerk.

701 In the United States Circuit Court of Appeals for the Ninth Circuit.

MALVINA SHORT, Administratrix, etc., *et al.*, Appellants,
*vs.*
THE BARGE COLUMBIA, ETC., ET AL., Appellees.
} No. 172. Filed May 6, 1895.

Appeal from the district court of the United States for the district of Oregon.

Admiralty appeals—Non-joinder of parties—Limitation of liability.—All persons who file claims for damages in a proceeding for limitation of liability are interested adversely to the owner in respect to a decree which limits his liability; and where such petitioners are not treated, in the proceedings, as adverse to each other, part of them cannot maintain alone an appeal from such decree, in the absence of any proceedings to effect a severance of their interests.

This was a petition by the Oregon Railway & Navigation Company and the Oregon Short Line & Utah Northern Railway Com-

pany for limitation of liability in respect to damages occasioned by the wrecking of the barge Columbia. A number of parties filed claims for damages, and the district court entered a decree limiting the liability of the owners to the amount of $100. From this decree some of the petitioners have appealed.

C. E. S. Wood and Nathan H. Frank, for appellants.
W. W. Cotton, for appellee.

702 Before McKenna, circuit judge, and Hanford and Hawley, district judges.

HANFORD, *District Judge:*

This cause was commenced in the United States district court for the district of Oregon by the Oregon Railway & Navigation Company and the Oregon Short Line & Utah Northern Railway Company, under and pursuant to sections 4283–4285 of the Revised Statutes of the United States, and admiralty rules 54–57, to obtain a decree limiting the liability of said libelants for the losses occasioned by the wrecking of the barge Columbia. Robert Balfour, Stephen Wilson, Alexander Guthrie, Robert Brodie, Forman R. Bruce, and Walter J. Burns, partners in business under the firm name of Balfour, Guthrie & Co., Malvina Short, as the administratrix of the estate of Marshal B. Short, deceased, Sven Anderson, as administrator of the estate of John August Peterson, deceased, Anna C. Larsen, mother of said Peterson, and William Boyce, in his own behalf, appeared in the district court, made proof of their respective claims for damages, and contested the right of said libelants to the relief prayed. By the decree the total liability was fixed at $100, that amount being the appraised value of the wrecked vessel; and the same was divided into three equal parts, and awarded as follows: To Malvina Short, Sven Anderson, and Anna C. Larsen, $33.33, to William Boyce $33.33, and to the firm of Balfour, Guthrie & Co. $33.33. An attempt has been made by Balfour, Guthrie & Co., in their firm name, jointly with Malvina Short and Sven Anderson, in their respective characters as administratrix and administrator, to appeal from said decree, and at the instance of said parties a transcript of the record has been filed and the cause docketed in this court. Anna C. Larsen and William Boyce, parties to the decree, did not join the appellants in taking an appeal, nor refuse to join therein, nor waive their right to appeal. They are not treated in the proceedings as adverse parties to the appellants. No request to join in the appeal was made to them, and the court below did not make an order of severance. The petition for allowance of the appeal,
703 notice of appeal, and citation were served upon the libelants, but not served upon Mrs. Larsen and Boyce. The rules promulgated by the Supreme Court, above referred to, make all persons having claims for damages growing out of a marine casualty proper parties to any proceeding to limit the liability of the owner of the vessel, so that the entire subject-matter may be fully

and finally adjudicated in one proceeding. Providence & N. Y. S. S. Co. *v.* Hill Manuf'g Co., 109 U. S., 578–607, 3 Sup. Ct., 379, 617. For similar reasons when an appeal is taken, it is essential to the jurisdiction of the appellate court that each party having a right to be heard upon a review of the case should be brought before the court, or lawfully estopped from continuing the litigation. In every such case all the injured persons have a common interest in the main question as to the right of the owner to limit his liability, and, if judgment passes in his favor as to that question, they all are entitled to share in the distribution of the common fund arising from the sale of the vessel, or the payment into court of the appraised value thereof; and each person who appears and submits a claim for the court to pass upon has a right to appeal from a decision in favor of the owner. If Balfour, Guthrie & Co., and Mrs. Short and Anderson can prosecute this appeal without being joined by Mrs. Larsen and Boyce, then the two last named may each prosecute an appeal separately, or at least their right to do so continued for some time after this case had been docketed in this court. The Supreme Court has announced and reiterated several times the rule that separate appeals to that court, by several parties asserting interests in common affected by a single decree, cannot be permitted, and has enforced the rule by dismissing appeals when necessary parties were not joined, nor barred of their right to appeal by refusing to join after due notice. Owings *v.* Kincannon, 7 Pet., 402; Masterson *v.* Herndon, 10 Wall., 416; Hampton *v.* Rouse, 13 Wall., 187; Simpson *v.* Greeley, 20 Wall., 152; Sipperley *v.* Smith, 155 U. S., 86; 15 Sup. Ct., 15. These decisions declare a rule of law which governs this court in the exercise of its powers. By the eleventh section
704 of the act creating this court — is expressly provided that all provisions of law regulating the practice and system of review through appeals and writs of error shall regulate the method and system of appeals and writs of error provided for in said act in respect to the circuit court of appeals. 2 Supp. Rev. St. (2d ed.), 905 (11 C. C. A., xix). If we ignore the irregularity of the proceedings in the firm name of Balfour, Guthrie & Co. without naming the individuals composing the firm, still the appeal should be dismissed because of the non-enjoinder of Mrs. Larsen and Mr. Boyce. No lawful appeal has been taken and this court is without jurisdiction to pass upon the merits of the cause. Appeal dismissed.

(Endorsed:) Opinion. Filed May 6, 1895. F. D. Monckton, clerk.

705 United States Circuit Court of Appeals for the Ninth Circuit.

MALVINA SHORT, Administratrix, etc.; SVEN ANDERSON, Administrator, etc., and Balfour, Guthrie and Company, Appellants,
*v.*
THE BARGE "COLUMBIA," ETC.; OREGON RAILWAY AND Navigation Company, and The Oregon Short Line and Utah Northern Railway Company.
} No. 172.

Appeal from the district court of the United States for the district of Oregon.

This cause came on to be heard on the transcript of the record from the district court of the United States for the district of Oregon and was argued by counsel.

On consideration whereof it is now here ordered, adjudged, and decreed by this court that the appeal of the said appellants in this cause be, and the same is hereby, dismissed.

(Endorsed:) Decree. Filed May 6th, 1895. F. D. Monckton, clerk.

706 At a stated term, to wit, the October term, A. D. 1894, of the United States circuit court of appeals for the ninth circuit, held at the court-room, in the city and county of San Francisco, on Monday, the twenty-fourth day of June, in the year of our Lord one thousand eight hundred and ninety-five.

Present: The Honorable Joseph McKenna, circuit judge; the Honorable William B. Gilbert, circuit judge; the Honorable Thomas P. Hawley, district judge.

MALVINA SHORT, Adm'r, &c., ET AL.
*v.*
THE BARGE "COLUMBIA," &c., ET AL.
} No. 172.

Ordered petitions for rehearing herein granted.

707 At a stated term, to wit, the October term, A. D. 1895, of the United States circuit court of appeals for the ninth circuit, held at the court-room, in the city and county of San Francisco, on Tuesday, the fifteenth day of October, in the year of our Lord one thousand eight hundred and ninety-five.

Present: The Honorable Joseph McKenna, circuit judge; Honorable William B Gilbert, circuit judge; Honorable Erskine M. Ross, circuit judge.

MALVINA SHORT, Adm'r'x, &c., ET AL., Appellants,
*v.*
THE BARGE COLUMBIA, &c.
} No. 172.

Ordered appeal reargued by C. E. S. Wood, Esq., and Nathan H. Frank, Esq., counsel for appellants, and W. W. Cotton, Esq., counsel for appellee-, and submitted to the court for consideration and decision.

708 At a stated term, to wit, the October term, A. D. 1895, of the United States circuit court of appeals for the ninth circuit, held at the court-room, in the city and county of San Francisco, on Thursday, the twenty-fourth day of October, in the year of our Lord one thousand eight hundred and ninety-five.

Present: The Honorable William B. Gilbert, circuit judge; Honorable Erskine M. Ross, circuit judge; Honorable William W. Morrow, district judge.

MALVINA SHORT, Executrix, &c., ET AL.
*v.*
THE BARGE COLUMBIA, &c., ET AL. } No. 172.

On motion of George H. Williams, Esq., counsel for Balfour, Guthrie & Co., ordered appeal amended so as to show that the appeal of Balfour, Guthrie & Co. is prosecuted in the name of Robert Balfour, Stephen Williamson, Alexander Guthrie, Robert Brodie Forman, R. Bruce, and Walter J. Burns, partners.

709 In the United States Circuit Court of Appeals for the Ninth Circuit.

MALVINA SHORT, Administratrix, etc.; Sven Anderson, Administrator, etc., and Balfour, Guthrie & Company, Robert Balfour *et al.*, Appellants,
*vs.*
THE BARGE COLUMBIA, ETC., OREGON Railway & Navigation Company, and The Oregon Short Line & Utah Northern Railway Company. } No. 172. Filed February 10, 1896.

*Opinion and Dissenting Opinion on Rehearing.*

1. Admiralty—Limitation of liability—Appeal—Parties.—When two or more parties, having distinct and several claims against the owners of a vessel, are brought into one proceeding for the limitation of the ship-owner's liability, or his exemption from liability, pursuant to Rev. St. §§ 4282–4290 and admiralty rules 54–57, the decree in such proceeding, awarding different sums to the different claimants, is several as to them, and any of such claimants may appeal from such decree, without making the others parties to the appeal, or notifying them thereof, McKenna, circuit judge, dissenting. 15 C. C. A., 91; 67 Fed., 942, reversed.

710 2. Same—Tug and tow.—When the owner of a barge which has no motive power undertakes to transport freight by means of the barge, such barge and a tug, belonging to the same owner, by which the motive power is supplied, become one vessel for the purposes of the voyage, and the owner is not entitled to limit his liability, under Rev. St. §§ 4282–4290, for damages caused by the negligence of the crew of either craft, without surrendering both.

Appeal from the district court of the United States for the district of Oregon.

This was a petition by the Oregon Railway & Navigation Company and the Oregon Short Line & Utah Northern Railway Company for a limitation of liability in respect to damages occasioned by the wrecking of the barge Columbia. Various parties filed claims for damages, and the district court rendered a decree limiting the liability of the owners to the amount of $100. From this decree some of the parties took an appeal, which, on May 6, 1895, on motion of the appellees, was dismissed. See 15 C. C. A., 91; 67 Fed., 942. Afterwards a rehearing was granted, and the motion to dismiss has again been argued.

Page, Eells & Wheeler and Andros & Frank, for appellants.
W. W. Cotton, for appellees.

Before McKenna, Gilbert, and Ross, circuit judges.

Ross, *Circuit Judge:*

The motion to dismiss the appeal is first to be disposed of. The contention in support of this motion, which was sustained by this court on the former hearing of this cause, is based upon the theory that the decree entered in the court below is a joint decree, in which all the respondents there have a common interest, and that, as two of them, namely, William Boyce and Anna C. Larson, did not join in the appeal and no request was made of them to join therein, and no order of severance was made by the court below, and no notice of appeal was served on them, the appeal must be dismissed.

711 By the amendatory act of Congress of June 19, 1886 (24 Stat., 79, 80), the provisions of what is commonly known as the "limited liability act," originally enacted March 3, 1851 (9 Stat., 635), and the provisions of which have been substantially incorporated into Rev. St., secs. 4282–4290, are made applicable to all vessels used on lakes, rivers, or in inland navigation, including canal-boats, barges, and lighters. Sections 4283 and 4284 of the Revised Statutes are as follows:

"SEC. 4283. The liability of the owner of any vessel, for any embezzlement, loss, or destruction, by any person, of any property, goods, or merchandise, shipped or put on board of such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing, *lost* (loss), damage, or forfeiture, done, occasioned, or incurred, without the privity, or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner in such vessel, and her freight then pending.

"SEC. 4284. Whenever any such embezzlement, loss or destruction is suffered by several freighters or owners of goods, wares, merchandise, or any property whatever, on the same voyage, and the whole value of the vessel, and her freight for the voyage, is not sufficient to make compensation to each of them, they shall receive compensation from the owner of the vessel in proportion to their respective losses; and for that purpose the freighters and (*owner*)

(owners) of the property, and the owner of the vessel, or any of them, may take the appropriate proceedings in any court, for the purpose of apportioning the sum for which the owner of the vessel may be liable among the parties entitled thereto."

To facilitate and further the proceedings authorized by the act of March 3, 1851, the supreme court promulgated certain supplemental rules of practice in admiralty, numbered, respectively, 54, 55, 56, and 57, which are found in 13 Wall., xii, xiii, and the validity of which has been judicially determined. Providence & N. Y. S. S. Co. *v.* Hill Manuf'g Co., 109 U. S., 578–590; 3 Sup. Ct., 379, 617; Norwich Co. *v.* Wright, 13 Wall., 104. Those rules provide,
712 among other things, that owners of vessels, making suitable allegations for the purpose, shall be at liberty to contest their liability, or the liability of the vessel, to pay any damages, as well as to show that, if liable, they are entitled to a limitation of liability. Rule 56; Providence & N. Y. S. S. Co. *v.* Hill Manuf'g Co., *supra*. And that is what the petitioners in the court below sought to do.

They commenced the proceedings by the filing in the district court for the district of Oregon of a petition by the Oregon Railway & Navigation Company and the Oregon Short Line & Utah Northern Railway Company, which set forth, among other things, the ownership by the Oregon Railway & Navigation Company of a certain barge known as the Columbia, used and operated upon the Columbia and Willamette rivers, and that the Oregon Short Line & Utah Northern Railway Company is engaged in operating steamboats and other vessels, and in owning and operating lighters and barges between Portland and Astoria, in the State of Oregon, and elsewhere, and during the times mentioned in the petition was lessee, from the Oregon Railway & Navigation Company, for a period of 99 years, from the 1st day of January, 1887, of the barge Columbia, and was at all the times mentioned in the petition operating that barge under the terms and provisions of the lease, and had the sole possession and control thereof; that on or about October 21, 1892, the barge Columbia left Portland with a cargo of wheat, for transportation to Astoria, the wheat being part of the cargo of the British ship Westgate, and destined to be transported by means of the barge Columbia and the ship Westgate from Portland, Or., to Liverpool, England; that the barge was seaworthy, and that the wheat was properly loaded thereon, and that all went well until the barge, on the night of the 21st of October, 1892, reached Astoria, at which point the barge intended to tie up alongside the dock of the Oregon Railway & Navigation Company; that lying in front of the dock, and floating nearly level with the water, and designed for the purpose of preventing ships from chafing against the timbers of the dock, was a pontoon, consisting of
713 12 x 12 inch timbers, securely fastened together, and being 60 feet long, 1 foot thick, and 4 feet wide; that the barge was towed by the steamboat Ocklahama, and that the darkness of the night rendered it impossible for the crew and captain in charge of the Columbia to see the pontoon, and, in attempting to make a landing at the dock, the barge ran against the pontoon with suf-

ficient force to break the stem and forefoot of the barge, and to start her timbers to such an extent that she commenced leaking; that those in charge of the barge deemed it necessary and advisable to remove her into shallower water, in order that the barge and her cargo might be more conveniently saved, and thereupon the barge was taken behind the dock, and placed alongside the rear portion thereof; that, after an examination had been made by the men in charge of the barge, it was found that she would probably float if the pumps were used, and thereupon the men in charge of her commenced using the pumps, and kept the leak in control, so that the barge did not continue to make water faster than it was pumped out of her; that the cargo upon the barge was entirely loaded upon her deck, as is customary and proper in vessels of her character, and that, at the time the pumps were working, no part of her cargo in the barge was injured in any manner, but that the cargo was injured in the manner afterwards stated; that the men in charge of the barge undertook to stop the leak by building a bulkhead, intending to place between the bulkhead and the bow of the barge sacks of wheat, for the purpose of stopping the leak; that, in order to aid in the work of building the bulkhead, three men, among others, entered the hold of the barge, namely, Marshal Short, the captain of the Ocklahama, William Boyce, a deck hand on the Ocklahama, and one Gus Peterson, who was a deck hand either of the barge or of the Ocklahama; that the tide was at this time ebbing, and, while the men named were in the hold of the barge, the latter touched ground; that an examination was thereupon made by the men in charge of the barge as to her condition and position, and they thereupon concluded to continue the
714 work of undertaking to stop the leak, believing that the barge would sink into the mud and remain upright; that, as the tide continued to flow the barge suddenly listed to one side, away from the dock, and partially turned over; that, as Short and Peterson undertook to escape from the hold of the barge, they were caught by the falling cargo, consisting of wheat in sacks, piled in tiers upon the deck of the barge, and were crushed and killed; that a large amount of the cargo was thrown into the water, and the barge subjected to such a severe strain that her house was carried away and her hull damaged; that Boyce claims to have been thrown down and injured as a result of the listing of the barge; that the accident happened, and the loss, damage, injury, and destruction set forth were occasioned, done, and occurred without the fault, privity, or knowledge of the petitioners or either of them, and were due solely to the perils of the sea; that, nevertheless, the administrators of Short and Peterson, and the firm of Balfour, Guthrie & Co., threaten to and will, unless restrained as prayed, commence actions against the petitioners, or one of them, to recover damages claimed to be suffered by the accident; that on or about November 15, 1892, Boyce commenced an action in the circuit court of the State of Oregon for Multnomah county, against the petitioners, to recover damages in the sum of $15,000 for injuries alleged to have been suffered by him, which action is pending; that the claims so

made by the persons mentioned, and each of them, are largely in excess of the value of the barge in the condition in which she was after the accident and damage on the 22d of October, 1892, when her voyage was completed; that there was no freight money due or owing to the barge or either of the petitioners on account of the transportation of the cargo of wheat, and that there was no freight then pending in connection with the barge; that the petitioners, and each of them, desire to contest their liability for the loss, destruction, damage, and injury occasioned by the accident, and also to claim the benefit of the limitation of liability provided by the acts of Congress, and, to that end, desire an appraisement to be made and had of the amount or value of the interest of each
715 of said persons, and of the barge in the condition in which she was after the accident and damage on October 22, 1892, and of her freight then pending, and for that purpose, petitioners ask that the barge be examined, and her value ascertained, by a commissioner of the circuit court, or by such other means as the court shall direct.

The petition further alleged, among other things, that the barge was, at the time of the accident, under the sole and exclusive management, operation, and control of the Oregon Short Line & Utah Northern Railway Company, and that none of the men on board of the barge were officers, agents, or employees of the Oregon Railway & Navigation Company; that the cargo of wheat belonging to Balfour, Guthrie & Co. was being carried by the Oregon Short Line & Utah Northern Railway Company under and by virtue of a bill of lading or shipping receipt issued by that company, and was not being carried, handled, or controlled in any manner by the Oregon Railway & Navigation Company. And the Oregon Short Line & Utah Northern Railway Company allege that the barge was in all respects sound, staunch, and seaworthy, and was properly manned, equipped, and provided for the voyage in which she was engaged, and under the charge and management of proper and suitable officers; that the captain of the barge executed to Balfour, Guthrie & Co. a shipping receipt or bill of lading for the wheat carried upon her, to wit, 8,898 sacks, which receipt contained the following provision, to wit: "In consideration of the reduced rate at which the articles covered by this receipt are carried, it is agreed by the undersigned, for and on behalf of the owner of the property, that the Oregon Short Line & Utah Northern Railway Company shall not be responsible for any injury or damage to the property described in this receipt not caused by the actual negligence of the said company or its agents;" that the agreement so contained in the receipt was signed by Balfour, Guthrie & Co., and that the wheat was being carried under the terms and provisions of that receipt, and not otherwise; that the injury to the wheat did not occur by
716 reason of any negligence on the part of either of the petitioners, or of any of their agents or servants, but was caused solely by a peril over which the petitioners, and each of them, had no control, and which injury could not have been prevented by the exercise of any care on the part of the petitioners, their officers,

agents, or employees. The petitioners further alleged that Short, Boyce, and Peterson, and each of them, well knew the danger connected with working in the hold of the barge, and that the danger was one of the risks of their employment, voluntarily assumed by them, and each of them had knowledge of the danger connected therewith, and that the injuries resulting to Boyce and to the estates of Short and Peterson were not caused by any negligence or lack of care or skill on the part of the petitioners, or any of their officers, agents, or employees, but were the results solely of the contributory negligence of Short, Boyce, and Peterson, and each of them, in entering and remaining in the hold of the barge well knowing the danger connected with working therein; that the barge has not been libeled or arrested in any court for any of the injuries, loss, or destruction claimed, but the petitioners have been sued in the circuit court of Multnomah county, of the State of Oregon, as aforesaid. And the petition concluded with the prayer that the court cause appraisement to be had of the value of the barge in the condition in which it was immediately after the accident, and, upon the ascertainment of such value, make an order for the payment thereof into court, or for the giving of a stipulation, with sureties, for the payment thereof into court whenever the same shall be ordered, and will issue a monition against all persons claiming damages for any loss, destruction, or damages or injury occasioned by the accident, citing them to appear before the court and make due proof of their claims at a time to be therein named, as to all of which the petitioners, and each of them, will contest their liability, independent of the limitation of liability claimed under the statutes aforesaid; and that the court designate a commissioner before whom proof of all claims presented in pursuance of such monition, shall be made, and that, upon the
717 giving in of the report of the commissioner, and upon the hearing of the cause, if it shall appear that the petitioners are not liable for such loss, destruction, damage, and injury, it may be so finally decreed by the court, and that in the meantime, until the final judgment of the court shall be given, an order be entered restraining the further prosecution of all or any suit or suits against the petitioners, or either of them, in respect to any claim or claims.

Upon the filing of the petition an order was made by the court appointing appraisers to appraise the value of the barge, her tackle, apparel, and furniture, as the same was at the end of her voyage at Astoria, on October 22, 1892, and after the injury and damage set forth in the petition, and also to determine the value of her freight then pending, if any. The appraisers, having qualified as such, appraised the barge, her tackle, apparel, and furniture at the sum of $100, and found that the freight pending was nothing, it not having been delivered according to contract. Thereupon the petitioners were authorized to give a stipulation for the value of the barge, her tackle, etc., as fixed in the appraisement, which was done. Whereupon, the court ordered the issuance and publication of a monition commanding all persons claiming damages for any loss, destruction, damage, or injuries occasioned by the disaster to the barge Colum-

bia, referred to in the petition, to appear and make due proof of their respective claims on or before a certain fixed day, and naming a commissioner before whom such claims should be presented, and restraining all persons from proceeding further against the petitioners, or in respect to such claims, by any separate or independent suit. Pursuant to this monition, Balfour, Guthrie & Co., Malvina Short, as administratrix of the estate of the deceased Short, Sven Anderson, as administrator of the estate of the deceased Peterson, Anna C. Larson, the mother of the deceased Peterson, and William Boyce, appeared and answered separately, and by different proctors set up separately, and not in connection with each or any other, their own separate and distinct claims for loss and damage. The claims
718 of Anna C. Larson and Sven Anderson, as administrator, and of Malvina Short, as administratrix, were for the death of Peterson and Short, respectively; that of Boyce was for injuries claimed to have been sustained by him, and for wages claimed to be due him; and that of Balfour, Guthrie & Co., set up the contract of carriage in defense of the petitioners' right to exemption from liability, and in defense of their right to a limitation of liability.

In support of these several claims and defenses, the respective claimants filed, as has been said, separate answers, some of which were amended. The answer of Balfour, Guthrie & Co. alleged among other things, that the barge was not sound, staunch, or seaworthy at the time she was loaded for the voyage in question; that her cargo was carelessly, negligently, and improperly loaded, and was, in fact, overloaded; that the barge was insufficiently manned and equipped; and that her crew was without the necessary skill and experience for the business in which she was engaged; that all these matters were at the time well known to the owners, their officers, agents, and employees; that both the tug Ocklahama and the barge were so negligently handled at the time of the landing of the barge at the dock at Astoria that her bow was stove in; and that, in removing her to the inside of the dock, petitioners were guilty of negligence and unskillfulness.

The answer of Boyce, as amended, among other things, denied that the barge was seaworthy or in good order or condition, or that her cargo was properly loaded, or that all went well with her until the night of the 21st of October, 1892, or that the accident was at all due to the perils of the sea; but, on the contrary, alleged that the barge was lashed to the side of the steamtug Ocklahama, and, under its control, was under such headway and high rate of speed, that the Ocklahama ran the bow of the barge under the dock, striking the same and cutting off several of the piles, and by which the anchor was thrust through the side of the barge; that the damage, injury, and loss mentioned in the petition were caused wholly by the negligent manner in which the Ocklahama ran the barge
719 into the dock, and not by the careless manner in which the barge was overloaded or otherwise; that he (Boyce) was employed as a deck hand on board the Ocklahama, and was ordered by her captain to go in the hold of the barge, and that, while engaged in building the bulkhead therein, as ordered by the cap-

tain of the Ocklahama, the barge listed and started to turn over, when he (Boyce) undertook to escape from the hold, and was greatly injured by the falling of the wheat. In a cross-libel filed by Boyce, he set up, among other things, the same matters alleged in his answer, and also that he was employed as a deck hand on the Ocklahama, at the monthly wages of $40, with board and lodging; that, in approaching the dock at Astoria, the captain of the Ocklahama, having in tow the barge, did not use due care or caution, but that the Ocklahama was so improperly and unskillfully managed and navigated that she was driven upon and into the wharf with such force as to drive one fluke of the anchor through the bottom of the barge, making a hole therein and letting the water into the hold thereof; that, while the steamtug and barge were under the full control of the master of the tug, he (Boyce) in obedience to the orders of the master, went from the tug Ocklahama to and upon the barge, and into her hold, to assist in repairing the leak, and, being in the performance of his duty, and in obedience to the orders of the master of the Ocklahama, and without any want of due care upon his part, the barge turned to one side, causing the cargo of wheat to move and shift, whereby a large quantity of water entered the hold and the deck was broken in; that, as the barge was sinking, he (Boyce) endeavoring to save his life, undertook to escape from the hold, and was greatly injured by the falling sacks of wheat, the particulars of which injury he set out, and by which he lost all the profits of his labor from the 22d day of October, 1892, to wit, the sum of $40 per month and his board and lodging, and has become permanently injured, to his damage in the sum of $15,000, for all of which he asked judgment.

The answer of Malvina Short, as administratrix of the estate of the deceased Short, as also the answer of Sven Anderson as
720 administrator of the estate of the deceased Peterson, alleged the same matters of negligence set out in the answer of Balfour, Guthrie & Co., except as to the alleged insufficiency and unskillfulness of the crew of the barge, and except, also, as to the allegation of negligence in making the landing at Astoria, and in moving the barge to the inside of the dock. They also allege that the barge was improperly constructed, in having a round, instead of a flat, bottom, and that there was negligence on the part of the petitioners in not having provided suitable pumps and pumping apparatus.

The answer of Anna C. Larson, mother of the deceased Peterson, among other things, denied that the barge was seaworthy, or in good order or condition, or that the cargo of wheat was properly loaded thereon, or that the accident occurred without the fault, privity, or knowledge of the petitioners, or was at all due to the perils of the sea, or that the barge was properly manned or equipped for the voyage in which she was engaged or was under the charge of proper officers. It also alleged that she is the mother and sole surviving parent of the deceased Peterson, who was, at the time of the accident, in the employment of the petitioners as deck hand on the Ocklahama, and subject to the orders of the captain thereof,

who was the deceased Short; that, on the afternoon of October 21, 1892, Short, pursuant to the orders of the petitioners, took the barge, which was then old, decayed, leaky, and utterly unseaworthy, and without suitable pumps and pumping apparatus, of all of which the petitioners were aware, and which was negligently and unskillfully overloaded, and by means of the steamtug Ocklahama, towed the barge, having the deceased Peterson on board as a deck hand, from Portland to one of its docks at Astoria; that, on October 22, 1892, at the dock at Astoria, while the barge was still attached to the Ocklahama, and in tow thereof and in control of the captain of the Ocklahama, the deceased Peterson, by the order of the captain of the tug, went from the deck of the Ocklahama, on board the barge, and into her hold, to assist in repairing the leak
721 therein, and, while so engaged, and without any fault or want of due care or caution on his part, but solely by reason of the unsound and unsafe condition of the barge, and of her overloading, and to the carelessness of the petitioners, the barge suddenly turned to one side, and gave way, thereby causing the cargo of wheat to shift, whereby a quantity of water was shipped into the hold, the deck of the barge broken, the hatchways filled with sacks of wheat, by means of which the deceased Peterson then and there lost his life, and by which the respondent Anna C. Larson was damaged in the sum of $6,000, for which she asked judgment.

The barge Columbia in respect to which the petitioners sought to limit their liability not having been surrendered to a trustee, as provided for by section 4285 of the Revised Statutes, the proceeding taken was not a proceeding *in rem*, but a suit in equity (*In re* Morrison, 147 U. S., 14–34; 13 Sup. Ct., 246); and a suit in equity, not only for the purpose of limiting the liability of the petitioners, if any liability should be found to exist, but, as has been shown, also to have it judicially determined that no liability at all attached to the petitioners by reason of the injuries, damage, and loss mentioned in the petition. The monition issued and published in pursuance of the petition commanded all persons having claims growing out of the matters therein alleged to appear and intervene *pro interesse suo*. 13 Wall., 104; 109 U. S., 591; 3 Sup. Ct., 379, 617. All persons having such a claim or claims are forced by the provisions of the law into the one suit; but, when they come into it, each is entitled to set up the facts relied upon by him to make good his claim. Obviously, they may, and often do, rest upon separate and distinct grounds. It was so in the present case. All of the parties defendant, it is true, sought to defeat any limitation of liability of the petitioners, and each of the respondents sought to hold the petitioners liable for the full amount of damage sustained; but the ground of each claim, unless it be the claims of Sven Anderson, as administrator, and Anna C. Larson, was certainly separate and distinct from any other. The claim of Balfour, Guthrie &
722 Co. was for damages for breach of a contract of carriage; that of Malvina Short, as administratrix, was for damages sustained by the death of her husband; of Boyce, for damages for loss of wages and for personal injuries sustained by himself; and

those of Sven Anderson, as administrator, and Anna C. Larson, for damages sustained by the death of Peterson.

As has been shown, the purpose of the proceedings on the part of the petitioners was not only the limitation of their liability, but to obtain a decree that they are not liable at all by reason of any of the matters or things alleged in the petition. The subject of the suit, therefore, goes far beyond the value of the barge Columbia, for which the petitioners gave a stipulation, and involves subject-matters in which the various claimants have no common interest. What interest has Malvina Short, as administratrix, or Sven Anderson, as administrator, or Boyce, or Anna C. Larson, in the wheat of Balfour, Guthrie & Co. that was lost? What interest has that company in the death of Short or of Peterson, or in the injuries and damage sustained by Boyce? And what interest has Malvina Short as administratrix in the death of Peterson or in any of the injuries or damage sustained by Boyce? Or Anderson, as administrator, or Anna C. Larson, in the death of Short, or in the injuries and damage sustained by Boyce? Or Boyce, in the death of Short or Peterson? Obviously, none. These causes of action are the subject-matters of the suit, in which the interests are manifestly separate and distinct. In no respect does the stipulated value of the barge, which the petitioners offer to give in satisfaction of all of the claims of the respondents, constitute the subject-matter. If so, what about the Ocklahama, which they do not bring into the suit at all? And yet one of the principal questions in the case is whether the petitioners are not required to surrender the Ocklahama as a condition precedent to securing a limitation of liability, if they are entitled to any such limitation at all. The fact that each of the claims may be established by the same proof does not convert separate and distinct subject-matters and separate and distinct claims into a common subject-matter and a common claim, nor give to the various claimants a common interest therein.

723 The proceedings here in question are quite analogous to joint suits for seamen's wages, and to the practice in cases of salvage. In Oliver *v.* Alexander, 6 Pet., 143, which was a libel by officers and seamen for their wages, and in which proceeding a separate decree was entered by the trial court for each libelant, for the amount found due him, and apportioning *pro rata* the payment of the same out of the funds in court and decreeing the deficit to be paid by the owners of the ship, the sums so decreed to the libelants, respectively, in no case exceeded $900. From the separate decrees so rendered, an appeal was taken to the supreme court, the appellant giving several appeal bonds upon the appeal from each decree, as well as a joint appeal bond for the whole. A motion was made to dismiss the appeal upon the ground that the sum in controversy in each decree was less than $2,000, and, as such, insufficient to give the supreme court appellate jurisdiction. The motion was resisted upon the ground that the aggregate in controversy under the whole of the decrees, taken together, greatly exceeded that value. The court granted the motion, and dismissed

the appeal for want of jurisdiction, and in the course of its opinion said:

"It is well known that every seaman has a right to sue severally for his own wages in the courts of common law, and that a joint action cannot be maintained in such courts, by any number of seamen, for wages accruing under the same shipping articles for the same voyage. The reason is that the common law will not tolerate a joint action, except by persons who have a joint interest and upon a joint contract. If the cause of action be several, the suit must be several also. But a different course of practice has prevailed for ages in the court of admiralty in regard to suits for seamen's wages. It is a special favor, and a peculiar privilege allowed to them, and to them only, and is confined strictly to demands for wages. The reason upon which the privilege is founded is equally wise and humane. It is, to save the parties from oppressive costs and expenses, and to enable speedy justice to be administered to all who stand in a similar predicament—in the expressive language of the maritime law, '*velis levatis*.' And the benefit is equally as great to the ship-owner as to the seamen, though the burden
724 would otherwise fall upon the latter, from their general improvidence and poverty, with a far heavier weight. A joint libel may, therefore, always be filed in the admiralty by all the seamen who claim wages for services rendered in the same voyage under the same shipping articles. But, although the libel is thus in form joint, the contract is always treated in the admiralty, according to the truth of the case, as a several and distinct contract with each seaman. Each is to stand or fall by the merits of his own claim, and is unaffected by those of his colibelants. The defense which is good against one seaman may be wholly inapplicable to another. One may have been paid, another may not have performed the service, and another may have forfeited, in whole or in part, his claim to wages. But no decree whatsoever which is made in regard to such claim can possibly avail to the prejudice of the merits of others which do not fall within the same predicament; and wherever, from the nature of the defense, it is inapplicable to the whole crew, the answer invariably contains separate averments, and is applied to each claim according to its own peculiar circumstances. The decree follows the same rule, and assigns to each seaman severally the amount to which he is entitled, and dismisses the libel as to those, and those only who have maintained no right to the interposition of the court in their favor. The whole proceeding, therefore, from the beginning to the end of the suit, though it assumes the form of a joint suit, is in reality a mere joinder of distinct causes of action, by distinct parties, growing out of the same contract, and bears some analogy to the known practice at the common law of consolidating actions against different underwriters, founded upon the same policy of insurance. Be this as it may, it is the established practice of the admiralty. The act of Congress, already referred to, adopts and sanctions the practice; and it enacts that, in proceedings *in rem* against the ship for mariners' wages, 'all the seamen or mariners having cause of complaint of the like kind

against the same ship or vessel, shall be joined as complainants.' Act 1790, c. 29, sec. 6. It thus converts what by the admiralty law is a privilege into a positive obligation where the seamen commence a suit at the same time in the same court by a proceeding *in rem* for their wages. And it further directs that 'the suit shall be proceeded on in the said court, and final judgment be given, according to the course of admiralty courts in such cases used.' Act 1790, c. 29, sec. 6. From this summary view of the nature and
725 operation of the proceedings in the admiralty, in cases of joint libels for wages, it is obvious that the claim of each seaman is distinct and several, and the decree upon each claim is, in like manner, distinct and several. One seaman cannot appeal from the decree made in regard to the claim of another, for he has no interest in it and cannot be aggrieved by it. The controversy, so far as he is concerned, is confined solely to his own claim; and the matter of dispute between him and the owners or other respondents is the sum or value of his own claim, without any reference to the claims of others."

In Thomas *v.* Lane, 2 Sumn., 1, Fed. Cas. No. 13902, which was a cause of salvage, Judge Story said:

"My opinion is that there is no difference as to the right of appeal, whether the respondents sever or join in their answer or pleading, if the defense is several in its nature. * * * In case of an appeal from a joint decree in chancery against the defendants in the suit all the defendants affected by the decree must join; but this is because they are united in interest. And in suits in admiralty, founded upon contracts, I should have no doubt that the appeal must be by all the respondents charged, either personally or in interest by the decree. But wherever the case, though joint in form, is in reality several in its character, as in cases of salvage, where distinct owners intervene severally as respondents, each for his own interest, it seems to me that the decree, though in form joint, must be treated as several in its operation, and that each defendant must possess a several right of appeal for his own distinct interest."

In all of these cases the procedure is, in truth, a joinder of separate and distinct causes of action, the decrees in which, where several in their nature, should be treated as several in their operation even though joint in form. See also Hanrick *v.* Patrick, 119 U. S., 156; 7 Sup. Ct., 147; Russell *v.* Stansell, 105 U. S., 303; Gray *v.* Havemeyer, 3 C. C. A., 497; 53 Fed., 174. William Boyce, therefore, not having any interest in the questions at issue between the petitioners and the appellants, was not a necessary party to their appeal; and, if it be conceded that Anna C. Larson was a
726 necessary party to the appeal of Sven Anderson, as administrator of the estate of the deceased Peterson, her appearance in this court on the appeal, and the filing of a brief by her proctors, cure the lack of notice, since all that is required is that she be heard upon the appeal. Penhallow *v.* Doane's Adm'rs, 3 Dall., 87. For the reasons stated, the motion to dismiss the appeal is denied, and we proceed to a consideration of the merits.

All of the respondents and cross-libelants not only contended that the barge was, from the inception of the voyage, unseaworthy, but also that the barge and tug were, in law, one vessel, and that, to avail themselves of the benefit of the limited liability act, the owners must surrender the tug as well as the barge in satisfaction of the loss and damage complained of. The court below found the fact to be that the barge was, at the time of the accident, seaworthy, and, as the evidence in respect to that question is decidedly conflicting, the finding of the trial court must be accepted on this appeal as conclusive. The Alejandro, 6 C. C. A., 54; 56 Fed., 621. The court below also found that the master of the barge was negligent in shifting certain portions of her cargo, and that this negligence of the master of the barge was the proximate cause of the sinking of the barge, and of the loss and injuries sustained by the respective claimants, and, holding, as it did, that "the tow service of the tug was ended before the proximate cause of the accident in question was set in motion," confined the compensation of the respective claimants to the stipulated value of the barge. In this we think the court below was in error.

The case shows that the wheat in question was destined to be transported from Portland, Or., to Liverpool, England, by means of the barge Columbia and the British ship Westgate. That fact appears, not only from the testimony in the case, but from the petition as well. The Oregon Short Line & Utah Northern Railway Company, lessee of the barge and of the tug Ocklahama, undertook to transport the wheat from Portland to the ship Westgate. The shipping receipt issued by the master of the barge to the owner of the wheat was issued on behalf of the owner of the craft. The
727 contract of carriage was the owners' contract, and the terms of the contract were that the carrier was only to be liable to the owner of the cargo for negligence. According to the contract, the carrier was liable for negligence. As the wheat was to be carried on board the barge, which had no motive power, of necessity such power had to be supplied by the carrier. This the carrier did, as was its custom, by means of a tug—in this instance, the tug Ocklahama, owned by the Oregon Railway & Navigation Company, and under lease to the Oregon Short Line & Utah Northern Railway Company, as was the barge Columbia. When the tug made fast and took in tow the barge, to perform the contract of carriage, the two became one vessel for the purpose of that voyage—as much so as if she had been taken bodily on board the tug, instead of being made fast thereto by means of lines. The Northern Belle, 9 Wall., 526-'29; Sturgis *v.* Boyer, 24 How., 110–122; The Merrimac, 2 Sawy., 595, Fed. Cas. No. 9478; The Bordentown, 40 Fed., 686.

In the case of The Northern Belle, the Supreme Court, in speaking of the facts there appearing, said:

"The barges are owned by the same persons who own the steamboats by which they are propelled, and are generally considered as attached to and making part of the particular boat in connection with which they are used, though quite often an individual or corporation owning several boats running in a particular trade have a

large number of barges, which are taken in tow by whatever boat of the same line may be found most convenient. In every case, however, the barge is considered as belonging to the boat to which she is attached for the purposes of that voyage."

In The Keokuk, 9 Wall., 519, the court found, from the evidence, that the carrier had made no contract to carry the wheat that had been put in one of the carrier's barges without its knowledge, and which, therefore, had not been cared for by the carrier and lost; but the court said:

"It is very clear, had the steamer taken the barge in tow, the lien would have attached, although the bills of lading were not
728 executed, because the act of towing the barge would be evidence that the grain was received, and that there was a contract to carry it safely. And the steamer would be equally liable if the barge had been left at the landing by the fault of the officers of the boat. But the evidence not only fails to prove this, but establishes the contrary conclusion."

In the present case, the barge and tug had the same owner, and both were operated by the same carrier. In the voyage, both were necessarily under the control of the master of the tug. They constituted the instrument of carriage, to which the wheat was liable for the service, and on which the owners of the cargo had a lien for the due performance of the contract of carriage. The case shows that the tug, having the barge loaded with wheat in tow, left Portland about 1 o'clock in the afternoon of October 21, 1892, and reached Astoria about 12 o'clock that night. Notwithstanding there is nothing in the case to show that the contract of carriage contemplated the landing of the wheat at Astoria, or the tying up of the barge at the dock at that place, but, on the contrary, the delivery of the wheat from the barge to the ship Westgate, yet the tug—due, probably to the late hour of arrival—undertook to tie up at the dock, and, in doing so, carelessly ran the barge against the piles of the dock, and with such force as to knock a hole in her stem, thereby causing a serious leak. The master of the tug continued, after the accident, to exercise control over the barge, as well as the tug, changed its position, put the engineer of the tug at work with a siphon to pump the water out of the barge, and himself went, with one of the deck hands of the tug, into the hold of the barge for the purpose of building a bulkhead to guard against the water, and was so engaged when, about two hours after the accident, the barge collapsed, causing the death of the master and deck hand of the tug, the injury of Boyce, a deck hand of the barge, and the loss of the wheat of Balfour, Guthrie & Co.

The court below held that the collapsing of the barge was occasioned by the negligent shifting of some sacks of wheat by the master of the barge, and that that act of his was the proxi-
729 mate cause of the loss and damage in question. But no question of proximate cause, we think, arises in the case, for the reason that the tug and barge are, in law, considered one vessel, for the purpose of the voyage in question, and, whether the accident giving rise to the loss and damage be directly attributable to the

acts of the master of the barge, or to those of the master of the tug, it is equally the negligence of the carrier, for which it contracted to be liable. It results that, in according the petitioners a limitation of liability without the surrender of the tug Ocklahama, the court below was in error.

Judgment reversed, and cause remanded for further proceedings not inconsistent with this opinion.

(Endorsed:) Opinion. Filed February 10, 1896. F. D. Monckton, clerk.

McKENNA, *Circuit Judge* (dissenting):

I am unable to agree with the majority of the court in the conclusions reached on the motion to dismiss the appeal, for the reasons stated by Judge Hanford in the opinion of the court at the original hearing, and reported in 67 Fed., 942; 15 C. C. A., 91. Jurisdiction being entertained, I concur in the judgment requiring the surrender of the steamer or tug Ocklahama, as well as of the barge.

(Endorsed:) Dissenting opinion. Filed February 10, 1896. F. D. Monckton, clerk.

730 United States Circuit Court of Appeals for the Ninth Circuit.

MALVINA SHORT, Administratrix of the Estate of Marshall B. Short, Deceased; Sven Anderson, Administrator of the Estate of John August Peterson, Deceased, and Robert Balfour, Stephen Williamson, Alexander Guthrie, Robert Brodie Forman, R. Bruce, and Walter J. Burns, Partners as Balfour, Guthrie & Co., Appellants, } No. 172.

*vs.*

THE BARGE "COLUMBIA," ETC.; OREGON RAILWAY & Navigation Company, and The Oregon Short Line & Utah Northern Railway Company.

Appeal from the district court of the United States for the district of Oregon.

This cause came on to be heard on the transcript of the record from the district court of the United States for the district of Oregon and was argued by counsel.

On consideration whereof it is now here ordered, adjudged, and decreed by this court that the decree of the said district court in this cause be, and the same is hereby, reversed with costs, and the cause is remanded to said district court for further proceedings not inconsistent with the opinion of this court.

(Endorsed:) Decree on rehearing. Filed Feb. 10, 1896. F. D. Monckton, clerk.

9566

731 In the United States Circuit Court of Appeals for the Ninth Circuit.

OREGON RAILROAD AND NAVIGATION COMPANY, THE Oregon Railway and Navigation Company, and The Oregon Short Line and Utah Northern Railway Company, Appellants,

*vs.*

ROBERT BALFOUR ET AL., Partners, Doing Business as Balfour, Guthrie & Company; Malvina Short, Administratrix of Marshall B. Short, Deceased; Sven Anderson, Administrator of John August Peterson, and Anna C. Larsen, Deceased, Appellees.

No. 435.

ROBERT BALFOUR ET AL., Doing Business as Balfour, Guthrie & Co., Appellants,

*vs.*

THE OREGON RAILROAD AND NAVIGATION COMPANY, The Oregon Railway and Navigation Company, The Oregon Short Line and Utah Northern Railway Company, Malvina Short, Administratrix of Marshall B. Short, Deceased; Sven Anderson, Administrator of John August Peterson, and Anna C. Larsen, Deceased, Appellees.

Appeal from the district court of the United States for the district of Oregon.

*Transcript of Record.*

732 In the District Court of the United States for the District of Oregon.

In the Matter of the Petition of the Oregon Railway and Navigation Company as the Owner of the Barge "Columbia" and the Oregon Short Line and Utah Northern Railway Company as Lessee Thereof to Limit Liability for Damage Done by the said Barge "Columbia."

*Order Extending Time to Docket Cause.*

Upon application of the Oregon Railway and Navigation Company, as the owner of the barge "Columbia," and of the Oregon Short Line and Utah Northern Railway Company, as lessee thereof, to limit liability for damage done by the said barge "Columbia," and upon application of the Oregon Railroad and Navigation Company to extend the time within which to complete and file the record in this cause, upon the appeal to the circuit court of appeals for the ninth judicial circuit to reverse the decree rendered in the above-entitled proceeding by the district court of the United States for the district of Oregon, and upon good cause being shown therefor, it is

Considered, ordered, adjudged, and decreed that the time within

which the record shall be made and filed in the circuit court
733 of appeals in the above-entitled cause be, and the same is, hereby extended until the 23d day of February, 1898.

Dated this 24th day of January, 1898.

CHARLES B. BELLINGER, *Judge.*

(Endorsed:) Filed January 29, 1898. F. D. Monckton, clerk U. S. circuit court of appeals, ninth circuit.

In the District Court of the United States for the District of Oregon.

In the Matter of the Petition of the Oregon Railway and Navigation Company as the Owner of the Barge "Columbia" and the Oregon Short Line and Utah Northern Railway Company as Lessee Thereof to Limit Liability for Damage Done by the said Barge "Columbia."

*Order Extending Time to Docket Cause.*

Upon the application of the Oregon Railway and Navigation Company, and of the Oregon Short Line and Utah Northern Railway Company, and upon the application of the Oregon Railroad and Navigation Company for the entry of an order extending the time within which to complete and file the record in this cause in the United States circuit court of appeals for the ninth judicial circuit,
734 upon the appeals taken by said parties to the circuit court of appeals for the ninth judicial circuit, to reverse the decree rendered in the above-entitled proceeding on December 20th, 1897, upon the vacation and setting aside of the decree entered therein on August 2d, 1897, in favor of Robert Balfour, Stephen Williamson, Alexander Guthrie, Robert Brodie Foreman, R. Bruce, and Walter J. Burns, partners, as Balfour, Guthrie & Co., and Malvina Short, administratrix of the estate of Marshal B. Short, deceased, and Sven Anderson, administrator of the estate of John August Peterson, deceased, by the district court of the United States for the district of Oregon, and upon good cause being shown,

It is now considered, ordered, adjudged, and decreed that the time within which to file in the circuit court of appeals for the ninth judicial circuit the record on the appeals of the Oregon Railway and Navigation Company, the Oregon Railroad and Navigation Company, and the Oregon Short Line and Utah Northern Railway Company to the circuit court of appeals for the ninth judicial circuit, to reverse the decree made and entered in the above-entitled matter by the district court of the United States for the district of Oregon, on the 20th day of December, 1897, upon the vacation and setting aside of the decree entered therein on August 2d, 1897, be, and the same is hereby, extended until the 23d day of February, 1898.

Dated this 3d day of February, 1898.

CHARLES B. BELLINGER, *Judge.*

(Endorsed:) Filed Feb. 16, 1898. F. D. Monckton, clerk.

735 In the District Court of the United States for the District of Oregon.

In the Matter of the Petition of the Oregon Railway and Navigation Company as the Owner of the Barge "Columbia" and the Oregon Short Line and Utah Northern Railway Company as Lessee Thereof to Limit Liability for Damage Done by the said Barge "Columbia."

*Citation.*

UNITED STATES OF AMERICA, *District of Washington,* } ss:

To Robert Balfour, Stephen Williamson, Alexander Guthrie, Robert Brodie Forman, R. Bruce, and Walter J. Burns, partners as Balfour, Guthrie & Co., and Malvina Short, administratrix of the estate of Marshal B. Short, deceased, and Sven Anderson, administrator of the estate of John August Peterson, deceased, and Anna C. Larson, mother of John August Peterson, deceased; the Oregon Short Line and Utah Northern Railway Company, and the Oregon Railroad and Navigation Company, Greeting:

You, and each of you, are hereby cited and admonished to be and appear before the United States circuit court of appeals
736 for the ninth circuit, at San Francisco, California, within thirty days hereof, pursuant to an appeal filed in the office of the clerk of the district court of the United States for the district of Oregon, in the above-entitled proceeding, wherein The Oregon Railway and Navigation Company is appellant and you are respondents, to show cause, if any there be, why the decree entered in the above-entitled proceeding on December 20, 1897, upon the vacation and setting aside of the decree entered thereon on August 2, 1897, in favor of the said Robert Balfour, Stephen Williamson, Alexander Guthrie, Robert Brodie Forman, R. Bruce, and Walter J. Burns, partners as Balfour, Guthrie & Co., and Malvina Short, administratrix of the estate of Marshal B. Short, deceased, and Sven Anderson, administrator of the estate of John August Peterson, deceased, thereby appealed from, should not be corrected and reversed and speedy justice should not be done to the parties in that behalf.

Witness, the Hon. Melville W. Fuller, Chief Justice of the United States, this 7th day of January, 1898.

CHARLES B. BELLINGER, *Judge.*

Service of the foregoing citation is hereby accepted this 7th day of January, 1898.

C. E. S. WOOD,
*Proctor for Robert Balfour, Stephen Williamson, Alexander Guthrie, Robert Brodie Forman, R. Bruce, and Walter J. Burns, Partners as Balfour, Guthrie & Co.*

E. B. WATSON,
*Proctor for Malvina Short and Sven Anderson and Anna C. Larson.*

737

W. W. COTTON,
*Proctor for the Oregon Short Line and Utah Northern Railway Co.*

W. W. COTTON,
*Proctor for the Oregon Railroad and Navigation Company.*

(Endorsed:) Filed January 7, 1898. E. D. McKee, clerk, by G. H. Marsh, deputy.

In the District Court of the United States for the District of Oregon.

In the Matter of the Petition of the Oregon Railway and Navigation Company as the Owner of the Barge "Columbia" and the Oregon Short Line and Utah Northern Railway Company as Lessee Thereof to Limit Liability for Damage Done by the said Barge "Columbia:"

*Citation.*

UNITED STATES OF AMERICA, *District of Washington,* } ss:

To Robert Balfour, Stephen Williamson, Alexander Guthrie, Robert Brodie Forman, R. Bruce, and Walter J. Burns, partners as Balfour, Guthrie & Co., and Malvina Short, administratrix of the estate of Marshal B. Short, deceased, and Sven Anderson,
738 administrator of the estate of John August Peterson, deceased, and Anna C. Larson, mother of John August Peterson, deceased; the Oregon Railway and Navigation Company, and the Oregon Railroad and Navigation Company, Greeting:

You, and each of you, are hereby cited and admonished to be and appear before the United States circuit court of appeals for the ninth circuit at San Francisco, California, within thirty days hereof, pursuant to an appeal filed in the office of the clerk of the district court of the United States for the district of Oregon, in the above-entitled proceeding, wherein The Oregon Short Line and Utah Northern Railway Company is appellant and you are respondents, to show cause, if any there be, why the decree entered in the above-entitled proceeding on December 20, 1897, upon the vacation and setting aside of the decree entered thereon on August 2, 1897, in favor of the said Robert Balfour, Stephen Williamson, Alexander Guthrie, Robert Brodie Forman, R. Bruce, and Walter J. Burns, partners as Balfour, Guthrie & Co., and Malvina Short, adminis-

tratrix of the estate of Marshal B. Short, deceased, and Sven Anderson, administrator of the estate of John August Peterson, deceased, thereby appealed from, should not be corrected and reversed and speedy justice should not be done to the parties in that behalf.

Witness, the Hon. Melville W. Fuller, Chief Justice of the United States, this 7th day of January, 1898.

CHARLES B. BELLINGER, *Judge.*

739 Service of the foregoing citation is hereby accepted this 7th day of January, 1898.

C. E. S. WOOD,
*Proctor for Robert Balfour, Stephen Williamson, Alexander Guthrie, Robert Brodie Forman, R. Bruce, and Walter J. Burns, Partners as Balfour, Guthrie & Co.*

E. B. WATSON (B.),
*Proctor for Malvina Short and Sven Anderson and Anna C. Larson.*

W. W. COTTON,
*Proctor for the Oregon Railway and Navigation Company.*

W. W. COTTON,
*Proctor for the Oregon Short Line and Utah Northern Railway Co.*

(Endorsed:) Filed January 7, 1898. E. D. McKee, clerk, by G. H. Marsh, deputy.

740 In the District Court of the United States for the District of Oregon.

In the Matter of the Petition of the Oregon Railway and Navigation Company as the Owner of the Barge "Columbia" and the Oregon Short Line and Utah Northern Railway Company as Lessee Thereof to Limit Liability for Damages Done by the said Barge "Columbia."

*Citation.*

UNITED STATES OF AMERICA, *District of Washington,* } *ss:*

To Robert Balfour, Stephen Williamson, Alexander Guthrie, Robert Brodie Forman, R. Bruce, and Walter J. Burns, partners as Balfour, Guthrie & Co., and Malvina Short, administratrix of the estate of Marshal B. Short, deceased, and Sven Anderson, administrator of the estate of John August Peterson, deceased, and Anna C. Larson, mother of John August Peterson, deceased; the Oregon Railway and Navigation Company, and the Oregon Short Line and Utah Northern Railway Company, Greeting:

You, and each of you, are hereby cited and admonished to be and appear before the United States circuit court of appeals
741 for the ninth circuit at San Francisco, California, within thirty days hereof, pursuant to an appeal filed in the office

of the clerk of the district court of the United States for the district of Oregon, in the above-entitled proceeding, wherein The Oregon Railroad and Navigation Company is appellant and you are respondents, to show cause, if any there be, why the decree entered in the above-entitled proceeding, on December 20, 1897, upon the vacation and setting aside of the decree entered thereon on August 2, 1897, in favor of the said Robert Balfour, Stephen Williamson, Alexander Guthrie, Robert Brodie Forman, R. Bruce, and Walter J. Burns, partners as Balfour, Guthrie & Co., and Malvina Short, administratrix of the estate of Marshal B. Short, deceased, and Sven Anderson, administrator of the estate of John August Peterson, deceased, thereby appealed from, should not be corrected and reversed and speedy justice should not be done to the parties in that behalf.

Witness the Hon. Melville W. Fuller, Chief Justice of the United States, this 7th day of January, 1898.

CHARLES B. BELLINGER, *Judge.*

Service of the foregoing citation is hereby accepted this 7th day of January, 1898.

C. E. S. WOOD,
*Proctor for Robert Balfour, Stephen Williamson, Alexander Guthrie, Robert Brodie Forman, R. Bruce, and Walter J. Burns, Partners as Balfour, Guthrie & Co.*

E. B. WATSON (B.),
*Proctor for Malvina Short and Sven Anderson and Anna C. Larson.*

742

W. W. COTTON,
*Proctor for the Oregon Railway and Navigation Company.*

W. W. COTTON,
*Proctor for the Oregon Short Line and Utah Northern Railway Co.*

(Endorsed:) Filed January 7, 1898. E. D. McKee, clerk, by G. H. Marsh, deputy.

In the District Court of the United States for the District of Oregon.

In the Matter of the Petition of the Oregon Railway and Navigation Company as the Owner of the Barge "Columbia" and the Oregon Short Line and Utah Northern Railway Company as Lessee Thereof to Limit Liability for Damages Done by the said Barge "Columbia."

*Citation.*

UNITED STATES OF AMERICA, *District of Oregon*, } ss:

To Robert Balfour, Stephen Williamson, Alexander Guthrie, Robert Brodie Forman, R. Bruce, and Walter J. Burns, partners as Balfour, Guthrie & Co., and Malvina Short, administratrix of
743 the estate of Marshal B. Short, deceased, and Sven Anderson, administrator of the estate of John August Peterson, deceased, and Anna C. Larson, mother of John August Peterson, deceased; the Oregon Short Line and Utah Northern Railway Company and the Oregon Railroad and Navigation Company, Greeting:

You and each of you are hereby cited and admonished to be and appear before the United States circuit court of appeals for the ninth circuit at San Francisco, California, on or before the 5th day of February, 1898, pursuant to an appeal filed in the office of the clerk of the district court of the United States for the district of Oregon, in the above-entitled proceeding, wherein The Oregon Railway and Navigation Company is appellant and you are respondents, to show cause, if any there be, why the decree entered in the above-entitled proceeding on December 20, 1897, upon the vacation and setting aside of the decree entered therein on August 2, 1897, in favor of the said Robert Balfour, Stephen Williamson, Alexander Guthrie, Robert Brodie Forman, R. Bruce, and Walter J. Burns, partners as Balfour, Guthrie & Co., and Malvina Short, administratrix of the estate of Marshal B. Short, deceased, and Sven Anderson, administrator of the estate of John August Peterson, deceased, thereby appealed from, should not be corrected and reversed and speedy justice should not be done to the parties in that behalf.

Witness the Hon. Melville W. Fuller, Chief Justice of the United States, this 22d day of January, 1898.

CHARLES B. BELLINGER, *Judge.*

744 Service of the foregoing citation is hereby accepted this 24th day of January, 1898.

C. E. S. WOOD,
*Proctor for Robert Balfour, Stephen Williamson, Alexander Guthrie, Robert Brodie Forman, R. Bruce, and Walter J. Burns, Partners as Balfour, Guthrie & Co.*

——— ———,
*Proctor for Malvina Short and Sven Anderson and Anna C. Larson.*

COX, COTTON, TEAL & MINOR,
*Proctors for the Oregon Short Line and Utah Northern Railway Company.*

COX, COTTON, TEAL & MINOR,
*Proctors for the Oregon Railroad and Navigation Company.*

*Return.*

UNITED STATES OF AMERICA, *District of Oregon,* } *ss:*

I hereby certify that on the 24th day of Jan'y, 1898, at Portland, Multnomah county, in said district, I duly served the within citation upon E. B. Watson, proctor for Malvina Short, Sven Anderson, and Anna C. Larson, by delivering to him, personally, a true copy of said citation, duly certified by me as United States marshal, and also certified as such by W. W. Cotton, proctor for appellant.

ZOETH HOUSER,
*United States Marshal,*
By J. A. WILSON, *Deputy.*

(Endorsed:) Filed Jan. 24, 1898. E. D. McKee, clerk U. S. district court.

745 In the District Court of the United States for the District of Oregon.

In the Matter of the Petition of the Oregon Railway and Navigation Company as the Owner of the Barge "Columbia" and the Oregon Short Line and Utah Northern Railway Company as Lessee Thereof to Limit Liability for Damage Done by the said Barge "Columbia."

*Citation.*

UNITED STATES OF AMERICA, } ss:
*District of Oregon,* }

To Robert Balfour, Stephen Williamson, Alexander Guthrie, Robert Brodie Forman, R. Bruce, and Walter J. Burns, partners as Balfour, Guthrie & Co., and Malvina Short, administratrix of the estate of Marshal B. Short, deceased, and Sven Anderson, administrator of the estate of John August Peterson, deceased, and Anna C. Larson, mother of John August Peterson, deceased; the Oregon Railway and Navigation Company, and the Oregon Railroad and Navigation Company, Greeting:

746 You, and each of you, are hereby cited and admonished to be and appear before the United States circuit court of appeals for the ninth circuit at San Francisco, California, on or before the 5th day of February, 1898, pursuant to an appeal filed in the office of the clerk of the district court of the United States for the district of Oregon, in the above-entitled proceeding, wherein The Oregon Short Line and Utah Northern Railway Company is appellant and you are respondents, to show cause, if any there be, why the decree entered in the above-entitled proceeding on December 20, 1897, upon the vacation and setting aside of the decree entered thereon on August 2, 1897, in favor of the said Robert Balfour, Stephen Williamson, Alexander Guthrie, Robert Brodie Forman, R. Bruce, and Walter J. Burns, partners as Balfour, Guthrie & Co., and Malvina Short, administratrix of the estate of Marshal B. Short, deceased, and Sven Anderson, administrator of the estate of John August Peterson, deceased, thereby appealed from, should not be corrected and reversed and speedy justice should not be done to the parties in that behalf.

Witness, the Hon. Melville W. Fuller, Chief Justice of the United States, this 22d day of January, 1898.

CHARLES B. BELLINGER, *Judge.*

Service of the foregoing citation is hereby accepted this 24th day of January, 1898.

C. E. S. WOOD,
*Proctor for Robert Balfour, Stephen Williamson, Alexander Guthrie, Robert Brodie Forman, R. Bruce, and Walter J. Burns, Partners as Balfour, Guthrie & Co.*

——— ———,
*Proctor for Malvina Short and Sven Anderson and Anna C. Larson.*

747

COX, COTTON, TEAL & MINOR,
*Proctors for the Oregon Railway and Navigation Company.*
COX, COTTON, TEAL & MINOR,
*Proctors for the Oregon Railroad and Navigation Company.*

*Return.*

UNITED STATES OF AMERICA, *District of Washington,* } ss:

I hereby certify that on the 24th day of Jan'y, 1898, at Portland, Multnomah county, in said district, I duly served the within citation upon E. B. Watson, proctor for Malvina Short, Sven Anderson, and Anna C. Larson, by delivering to him, personally, a true copy of said citation, duly certified to by me as United States marshal, and also certified to as such by W. W. Cotton, proctor for appellants.

ZOETH HOUSER,
*United States Marshal,*
By J. A. WILSON, *Deputy.*

(Endorsed:) Filed Jan. 24, 1898. E. D. McKee, clerk U. S. district court.

748 In the District Court of the United States for the District of Oregon.

In the Matter of the Petition of the Oregon Railway and Navigation Company as the Owner of the Barge "Columbia" and the Oregon Short Line and Utah Northern Railway Company as Lessee Thereof to Limit Liability for Damage Done by the said Barge "Columbia."

*Citation.*

UNITED STATES OF AMERICA, *District of Oregon*, } *ss:*

To Robert Balfour, Stephen Williamson, Alexander Guthrie, Robert Brodie Forman, R. Bruce, and Walter J. Burns, partners as Balfour, Guthrie & Co., and Malvina Short, administratrix of the estate of Marshal B. Short, deceased, and Sven Anderson, administrator of the estate of John August Peterson, deceased, and Anna C. Larson, mother of John August Peterson, deceased; the Oregon Railway and Navigation Company, and the Oregon Short Line and Utah Northern Railway Company, Greeting:

749 You, and each of you, are hereby cited and admonished to be and appear before the United States circuit court of appeals for the ninth circuit at San Francisco, California, on or before the fifth day of February, 1898, pursuant to an appeal filed in the office of the clerk of the district court of the United States for the district of Oregon, in the above-entitled proceeding, wherein The Oregon Railroad and Navigation Company is appellant and you are respondents, to show cause, if any there be, why the decree entered in the above-entitled proceeding on Dec. 20, 1897, upon the vacation and setting aside of the decree entered therein on Aug. 2, 1897, in favor of the said Robert Balfour, Stephen Williamson, Alexander Guthrie, Robert Brodie Forman, R. Bruce, and Walter J. Burns, partners as Balfour, Guthrie & Co., and Malvina Short, administratrix of the estate of Marshal B. Short, deceased, and Sven Anderson, administrator of the estate of John August Peterson, deceased, thereby appealed from, should not be corrected and reversed and speedy justice should not be done to the parties in that behalf.

Witness the Hon. Melville W. Fuller, Chief Justice of the United States, this 22d day of January, 1898.

CHARLES B. BELLINGER, *Judge.*

Service of the foregoing citation is hereby accepted this 24th day of January, 1898.

C. E. S. WOOD,
*Proctor for Robert Balfour, Stephen Williamson, Alexander Guthrie, Robert Brodie Foreman, R. Bruce, and Walter J. Burns, Partners as Balfour, Guthrie & Co.*

——— ———,
*Proctor for Malvina Short and Sven Anderson and Anna C. Lawson.*

750

COX, COTTON, TEAL & MINOR,
*Proctors for the Oregon Railway and Navigation Company.*
COX, COTTON, TEAL & MINOR,
*Proctors for the Oregon Short Line and Utah Northern Railway Company.*

*Return.*

UNITED STATES OF AMERICA, }
*District of Oregon,* } *ss:*

I hereby certify that on the 24th day of Jan'y, 1898, at Portland, Multnomah county, in said district, I duly served the within citation upon E. B. Watson, proctor for Malvina Short, Sven Anderson, and Anna C. Larson, by delivering to him, personally, a true copy of said citation, duly certified to by me as United States marshal, and also certified to as such by W. W. Cotton, proctor of appellants.

ZOETH HOUSER,
*United States Marshal,*
By J. A. WILSON, *Deputy.*

(Endorsed:) Filed Jan. 25, 1898. E. D. McKee, clerk United States district court.

751 In the District Court of the United States for the District of Oregon.

In the Matter of the Petition of the Oregon Railway and Navigation Company as the Owner of the Barge "Columbia" and the Oregon Short Line and Utah Northern Railway Company as Lessee Thereof to Limit Liability for Damages Done by the said Barge "Columbia."

*Citation.*

UNITED STATES OF AMERICA, *District of Oregon*, } ss:

To Robert Balfour, Stephen Williamson, Alexander Guthrie, Robert Brodie Forman, R. Bruce, and Walter J. Burns, partners as Balfour, Guthrie & Co., and Malvina Short, administratrix of the estate of Marshal B. Short, deceased, and Sven Anderson, administrator of the estate of John August Peterson, deceased, and Anna C. Larson, mother of John August Peterson, deceased; the Oregon Short Line and Utah Northern Railway Company, and Oregon Railroad and Navigation Company, Greeting:

752 You, and each of you, are hereby cited and admonished to be and appear before the United States circuit court of appeals for the ninth circuit at San Francisco, California, within thirty days of the date hereof, pursuant to an appeal filed in the office of the clerk of the district court of the United States for the district of Oregon, in the above-entitled proceeding, wherein The Oregon Railway and Navigation Company is appellant and you are respondents, to show cause, if any there be, why the decree entered in the above-entitled proceeding on August 2, 1897, in favor of the said Robert Balfour, Stephen Williamson, Alexander Guthrie, Robert Brodie Forman, R. Bruce, and Walter J. Burns, partners as Balfour, Guthrie & Co., and Malvina Short, administratrix of the estate of Marshal B. Short, deceased, and Sven Anderson, administrator of the estate of John August Peterson, deceased, thereby appealed from, should not be corrected and reversed and speedy justice should not be done to the parties in that behalf.

Witness the Hon. Melville W. Fuller, Chief Justice of the United States, this 25th day of January, 1898.

CHARLES B. BELLINGER, *Judge.*

Service of the foregoing citation is hereby accepted this 25th day of January, 1898.

C. E. S. WOOD,
*Proctor for Robert Balfour, Stephen Williamson, Alexander Guthrie, Robert Brodie Forman, R. Bruce, and Walter J. Burnes, Partners as Balfour, Guthrie & Co.*

——— ———,
*Proctor for Malvina Short and Sven Anderson and Anna C. Lawson.*

753 COX, COTTON, TEAL & MINOR,
*Proctors for the Oregon Short Line and Utah Northern Railway Company.*

COX, COTTON, TEAL & MINOR,
*Proctors for the Oregon Railroad and Navigation Company.*

*Return.*

UNITED STATES OF AMERICA, }
*District of Oregon,* } *ss:*

I hereby certify that on the 25th day of Jan'y, 1898, at Portland, Multnomah county, in said district, I duly served the within citation upon E. B. Watson, proctor for Malvina Short, Sven Anderson and Anna C. Larson, by delivering to him, personally, a true copy of said citation, duly certified to by me as United States marshal, and also certified to as such by E. D. McKee, clerk of the United States district court, for the district of Oregon, and also duly certified to by Wirt Minor, one of proctors for appellant.

ZOETH HOUSER,
*United States Marshal,*
By J. A. WILSON, *Deputy.*

UNITED STATES OF AMERICA, }
*District of Oregon,* } *ss:*

I, Wirt Minor, one of the proctors for the appellant in the above-entitled cause, do hereby certify that I have compared the
754 foregoing copy of citation with the original thereof, and that the same is a full, true, and correct copy of such original, and of the whole thereof.

WIRT MINOR,
*Proctor for Appellant.*

(Endorsed:) Filed Jan. 25, 1898. E. D. McKee, clerk United States district court.

In the District Court of the United States for the District of Oregon.

In the Matter of the Petition of the Oregon Railway and Navigation Company as the Owner of the Barge "Columbia" and the Oregon Short Line and Utah Northern Railway Company as Lessee Thereof to Limit Liability for Damage Done by the said Barge "Columbia."

*Citation.*

UNITED STATES OF AMERICA, } ss:
*District of Oregon,* }

To Robert Balfour, Stephen Williamson, Alexander Guthrie, Robert Brodie Forman, R. Bruce, and Walter J. Burns, partners as Balfour, Guthrie & Co., and Malvina Short, administratrix of the estate of Marshal B. Short, deceased, and Sven Anderson,
755 administrator of the estate of John August Peterson, deceased, and Anna C. Larson, mother of John August Peterson, deceased; the Oregon Railway and Navigation Company, and the Oregon Railroad and Navigation Company, Greeting:

You, and each of you, are hereby cited and admonished to be and appear before the United States circuit court of appeals for the ninth circuit at San Francisco, California, within thirty days from the date hereof, pursuant to an appeal filed in the office of the clerk of the district court of the United States for the district of Oregon, in the above-entitled proceeding, wherein The Oregon Short Line and Utah Northern Railway Company is appellant and you are respondents, to show cause, if any there be, why the decree entered in the above-entitled proceeding on August 2, 1897, in favor of the said Robert Balfour, Stephen Williamson, Alexander Guthrie, Robert Brodie Forman, R. Bruce, and Walter J. Burns, partners as Balfour, Guthrie & Co., and Malvina Short, administratrix of the estate of Marshal B. Short, deceased, and Sven Anderson, administrator of the estate of John August Peterson, deceased, thereby appealed from, should not be corrected and reversed and speedy justice should not be done to the parties in that behalf.

Witness the Hon. Melville W. Fuller, Chief Justice of the United States, this 25th day of January, 1898.

CHARLES B. BELLINGER, *Judge.*

756 Service of the foregoing citation is hereby accepted this 25th day of January, 1898.

C. E. S. WOOD,
*Proctor for Robert Balfour, Stephen Williamson, Alexander Guthrie, Robert Brodie Forman, R. Bruce, and Walter J. Burns, Partners as Balfour, Guthrie & Co.*

——— ———,
*Proctor for Malvina Short and Sven Anderson, and Anna C. Larson.*

COX, COTTON, TEAL & MINOR,
*Proctors for the Oregon Railway and Navigation Company.*

COX, COTTON, TEAL & MINOR,
*Proctors for the Oregon Railroad and Navigation Company.*

*Return.*

UNITED STATES OF AMERICA, *District of Oregon,* } ss:

I hereby certify that on the 25th day of Jan'y, 1898, at Portland, Multnomah county, in said district, I duly served the within citation upon E. B. Watson, proctor for Malvina Short, Sven Anderson, and Anna C. Larson, by delivering to him, personally, a true copy of said citation, duly certified to by me as United States marshal, and also certified to as such by E. D. McKee, clerk of the United States district court for the district of Oregon, and also duly certified to by Wirt Minor, one of proctors for appellant.

ZOETH HOUSER,
*United States Marshal,*
By J. A. WILSON, *Deputy.*

757 UNITED STATES OF AMERICA, *District of Oregon,* } ss:

Service by copy admitted at Portland, Or'n, Jan. 25th, 1898.

——— ———,
*Proctor for Balfour, Guthrie & Co.*

(Endorsed:) Filed Jan. 25, 1898. E. D. McKee, clerk United States district court.

In the District Court of the United States for the District of Oregon.

In the Matter of the Petition of the Oregon Railway and Navigation Company as the Owner of the Barge "Columbia" and the Oregon Short Line and Utah Northern Railway Company as Lessee Thereof to Limit Liability for Damage Done by the said Barge "Columbia."

*Citation.*

UNITED STATES OF AMERICA, *District of Oregon,* } ss:

To Robert Balfour, Stephen Williamson, Alexander Guthrie,
758 Robert Brodie Forman, R. Bruce, and Walter J. Burns, partners as Balfour, Guthrie & Co., and Malvina Short, administratrix of the estate of Marshal B. Short, deceased, and Sven Anderson, administrator of the estate of John August Peterson, deceased, and Anna C. Larson, mother of John August Peterson, deceased; the Oregon Railway and Navigation Company, and the Oregon Short Line and Utah Northern Railway Company, Greeting:

You, and each of you, are hereby cited and admonished to be and appear before the United States circuit court of appeals for the ninth circuit at San Francisco, California, within thirty days of the date hereof, pursuant to an appeal filed in the office of the clerk of the district court of the United States for the district of Oregon, in the above-entitled proceeding, wherein The Oregon Railroad and Navigation Company is appellant and you are respondents, to show cause, if any there be, why the decree entered in the above-entitled proceeding on August 2, 1897, in favor of the said Robert Balfour, Stephen Williamson, Alexander Guthrie, Robert Brodie Forman, R. Bruce, and Walter J. Burns, partners as Balfour, Guthrie & Co., and Malvina Short, administratrix of the estate of Marshal B. Short, deceased, and Sven Anderson, administrator of the estate of John August Peterson, deceased, thereby appealed from, should not be corrected and reversed and speedy justice should not be done to the parties in that behalf.

Witness, the Hon. Melville W. Fuller, Chief Justice of the United States, this 25th day of January, 1898.

CHARLES B. BELLINGER, *Judge.*

759 Service of the foregoing citation is hereby accepted this 25th day of January, 1898.

C. E. S. WOOD,
*Proctor for Robert Balfour, Stephen Williamson, Alexander Guthrie, Robert Brodie Forman, R. Bruce, and Walter J. Burns, Partners as Balfour, Guthrie & Co.*

——— ———,
*Proctor for Malvina Short and Sven Anderson, and Anna C. Larson.*

COX, COTTON, TEAL & MINOR,
*Proctors for the Oregon Railway and Navigation Company.*

COX, COTTON, TEAL & MINOR,
*Proctors for the Oregon Short Line and Utah Northern Railway Company.*

*Return.*

UNITED STATES OF AMERICA, *District of Oregon,* } ss:

I hereby certify that on the 25th day of January, 1898, at Portland, Multnomah county, Oregon, in said district, I duly served the within citation upon E. B. Watson, proctor for Malvina Short, Sven Anderson, and Anna C. Larson, by delivering to him, personally, a true copy of said citation, duly certified to by me as United States marshal, and also certified to as such by E. D. McKee, clerk of the United States district court for the district of Oregon, and also duly certified to by Wirt Minor, one of proctors for appellant.

ZOETH HOUSER,
*United States Marshal,*
By J. A. WILSON, *Deputy.*

760 UNITED STATES OF AMERICA, *District of Oregon,* } ss:

Service by copy admitted at Portland, Or'n, Jan. 25th, 1898.

———,
*Proctor for Balfour, Guthrie & Co.*

(Endorsed:) Filed Jan. 25, 1898. E. D. McKee, clerk United States district court.

In the Circuit Court of the United States for the District of Oregon.

In the Matter of the Petition of the Oregon Railway and Navigation Company as the Owner of the Barge "Columbia" and the Oregon Short Line and Utah Northern Railway Company as Lessee Thereof to Limit Liability for Damage Done by the said Barge "Columbia."

UNITED STATES OF AMERICA, } ss:
*District of Oregon,* }

*Citation.*

To Malvina Short, administratrix of the estate of Marshal B. Short, deceased, and Sven Anderson, administrator of the
761 estate of John August Peterson, deceased, and Anna C. Larsen and E. B. Watson, their proctor, and to the Oregon Railway and Navigation Company, and E. McNeill, receiver of the Oregon Railway and Navigation Company, and the Oregon Railroad and Navigation Company, and W. W. Cotton, their proctor, and to the Oregon Short Line and Utah Northern Railway Company and Zera Snow, its proctor, Greeting:

You, and each of you, are hereby severally cited and admonished to be and appear before the United States circuit court of appeals for the ninth circuit, at San Francisco, California, within thirty days from the date hereof, pursuant to the appeal filed in the office of the clerk of the district court of the United States for the district of Oregon, in the above-entitled cause, in which appeal Robert Balfour, Stephen Williamson, Alexander Guthrie, Robert Brodie, Forman R. Bruce, and Walter J. Burns, partners as Balfour, Guthrie & Co., are appellants, and you, the said Malvina Short, administratrix as aforesaid, Sven Anderson, administrator as aforesaid, Anna C. Larsen, The Oregon Railway and Navigation Company, E. McNeill, receiver as aforesaid, The Oregon Railroad and Navigation Company, and The Oregon Short Line and Utah Northern Railway Company, are appellees, to show cause, if any there be, why the decree entered by said district court in the above-entitled cause on the second day of August, 1897, should not be reversed, corrected, and modified, in so far as the same allows any recovery, or awards any damages, or distributes any portion of the fund in court in said cause, to the said Malvina Short, administratrix as aforesaid,
762 or Sven Anderson, administrator as aforesaid, and why speedy justice should not be done to the parties in that behalf.

Witness the Hon. Melville W. Fuller, Chief Justice of the United States, this 22d day of January, 1898.

CHARLES B. BELLINGER, *Judge.*

Due and regular service of the foregoing citation is hereby accepted this 24th day of January, 1898.

E. B. WATSON,
*Proctor for Malvina Short, Administratrix of the Estate of Marshal B. Short, Deceased, and Sven Anderson, Administrator of the Estate of John August Peterson, Deceased, and Anna C. Larsen.*

COX, COTTON, TEAL & MINOR,
*Proctors for the Oregon Railway and Navigation Company, and E. McNeill, Receiver Thereof, and the Oregon Railroad and Navigation Company.*

COX, COTTON, TEAL & MINOR,
*Proctors for the Oregon Short Line and Utah Northern Railway Company.*

(Endorsed:) Filed Jan. 24, 1898. E. D. McKee, clerk United States district court.

763 In the District Court of the United States for the District of Oregon.

In the Matter of the Petition of the Oregon Railway and Navigation Company as the Owners of the Barge "Columbia" and the Oregon Short Line and Utah Northern Railway Company as Lessee Thereof to Limit Liability for Damage Done by the said Barge "Columbia."

*Citation.*

UNITED STATES OF AMERICA, *District of Oregon,* } *ss:*

To Malvina Short, administratrix of the estate of Marshal B. Short, deceased, and Sven Anderson, administrator of the estate of John August Peterson, deceased, and Anna C. Larsen and E. B. Watson, their proctor, and to the Oregon Railway and Navigation Company, and E. McNeill, receiver of the Oregon Railway and Navigation Company, and the Oregon Railroad and Navigation Company, and W. W. Cotton, their proctor, and to the Oregon Short Line and Utah Northern Railway Company, and Zera Snow, its proctor, Greeting:

764 You, and each of you, are hereby severally cited and admonished to be and appear before the United States circuit court of appeals for the ninth circuit, at San Francisco, California, within thirty days from the date hereof, pursuant to the appeal filed in the office of the clerk of the district court of the United States for the district of Oregon, in the above-entitled cause, in which appeal Robert Balfour, Stephen Williamson, Alexander Guthrie, Robert Brodie Forman, R. Bruce, and Walter J. Burns, partners as Balfour, Guthrie & Co., are appellants, and you, the said Malvina Short, administratrix as aforesaid, Sven Anderson, ad-

ministrator as aforesaid, Anna C. Larsen, The Oregon Railway and Navigation Company, E. McNeill, receiver as aforesaid, The Oregon Railroad and Navigation Company, and The Oregon Short Line and Utah Northern Railway Company, are appellees, to show cause, if any there be, why the decree entered by said district court in the above-entitled cause on the twentieth day of December, 1897 (upon the vacation and setting aside of the decree of said district court entered in said cause on the second day of August, 1897), should not be corrected and modified, in so far as the same allows any recovery, or awards any damages, or distributes any portion of the fund in court in said cause, to the said Malvina Short, administratrix as aforesaid, or Sven Anderson, administrator as aforesaid, and why speedy justice should not be done to the parties in that behalf.

Witness the Hon. Melville W. Fuller, Chief Justice of the United States, this 22d day of January, 1898.

CHARLES B. BELLINGER, *Judge.*

765 Due and regular service of the foregoing citation is hereby accepted this 24th day of January, 1898.

E. B. WATSON,

*Proctor for Malvina Short, Administratrix of the Estate of Marshal B. Short, Deceased, and Sven Anderson, Administrator of the Estate of John August Peterson, Deceased, and Anna C. Larsen.*

COX, COTTON, TEAL & MINOR,

*Proctors for the Oregon Railway and Navigation Company and E. McNeill, Receiver Thereof, and the Oregon Railroad and Navigation Company.*

COX, COTTON, TEAL & MINOR,

*Proctor- for the Oregon Short Line and Utah Northern Railway Company.*

(Endorsed:) Filed Jan. 24, 1898. E. D. McKee, clerk United States district court.

In the District Court of the United States for the District of Oregon, March Term, 1896.

Be it remembered, that on the 15th day of March, 1896, there was duly filed in the district court of the United States for the district of Oregon, a mandate of the United States circuit court of appeals for the ninth circuit, in words and figures as follows, to wit:

766 *Mandate.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the district court of the United States for the district of Oregon, Greeting:

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

Whereas, lately in the district court of the United States for the district of Oregon, before you, or some of you, in a cause between

The Barge "Columbia," Oregon Railway and Navigation Company, and The Oregon Short Line and Utah Northern Railway Company, libelants and petitioners, and Malvina Short, administratrix of the estate of Marshal B. Short, deceased, Sven Anderson, administrator of the estate of John August Peterson, deceased, Anna C. Larsen, William Boyce, and Balfour, Guthrie & Company, respondents, a decree was duly filed and entered in said district court on the 19th day of February, 1894, which said decree was, on the 26th day of February, 1894, duly modified by order of the court, which said decree and order of court are of record in the office of the clerk of said district court, and to which reference is hereby made, and the same are hereby expressly made a part hereof, and as by the inspection of the transcript of the record of the said district court, which was brought into the United States circuit court of appeals, for the ninth circuit, by virtue of an appeal agreeably to the act of Congress, in such cases made and provided, fully and at large appears;

767 And whereas, in a term of October, and in the year of our Lord one thousand eight hundred and ninety-five, the said cause came on to be reheard before the said circuit court of appeals, on the said transcript of record, and was argued by counsel:

On consideration whereof, it is now here ordered, adjudged, and decreed by this court that the decree of the said district court in this cause be, and the same is hereby, reversed, with costs, and the cause is remanded to said district court for further proceedings not inconsistent with the opinion of this court.

(FEB. 10, 1896.)

You, therefore, are hereby commanded that such reversal and further proceedings be had in said cause, not inconsistent with the opinion and decree of this court, and as according to right and justice, and the laws of the United States, ought to be had, the said decree of said district court notwithstanding.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the 12th day of March, in the year of our Lord one thousand eight hundred and ninety-six.

F. D. MONCKTON,
*Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.*

768 *Costs of Appellants.*

| | |
|---|---|
| Clerk dist. court | $150 |
| Clerk C. C. app'ls | 44.70 |
| Printing record | 743.30 |
| Attorney | 20 |
| Taxed at | $958.00 |

F. D. MONCKTON, *Clerk.*

(Endorsed:) Filed March 15, 1896. E. D. McKee, clerk U. S. district court.

769 And afterwards, to wit, on Monday, the 16th day of March, 1896, the same being the 13th judicial day of the regular March term of said court—present, the Honorable Charles B. Bellinger, United States district judge, presiding—the following proceedings were had in said case, to wit:

In the District Court of the United States for the District of Oregon.

The Barge "Columbia;" The Oregon Railway and Navigation Company and The Oregon Short Line and Utah Northern Railway Company, Libelants and Petitioners; Balfour, Guthrie & Company *et al.*, Respondents. No. 3163.

*Order to File Mandate.*

MARCH 16, 1896.

Now, at this day, come the respondents, by Mr. C. E. S. Wood, of counsel, and present to the court the mandate of the United States circuit court of appeals for the ninth circuit, which mandate is in words and figures, to wit:

770 "UNITED STATES OF AMERICA, *ss*:

The President of the United States of America to the honorable the judges of the district court of the United States for the district of Oregon, Greeting:

[Seal of the U. S. Circuit Court of Appeals, Ninth Circuit.]

Whereas, lately in the district court of the United States for the district of Oregon, before you, or some of you, in a cause between The Barge 'Columbia,' Oregon Railway and Navigation Company, and The Oregon Short Line and Utah Northern Railway Company, libelants and petitioners, and Malvina Short, administratrix of the estate of Marshal B. Short, deceased, Sven Anderson, administrator of the estate of John August Peterson, deceased, Anna C. Larson, William Boyce, and Balfour, Guthrie and Company, respondents, a decree was duly filed and entered in said district court on the 19th day of February, 1894, duly modified by order of the court, which said decree and order of court are of record in the office of the clerk of said district court, and to which reference is hereby made, and the same are hereby expressly made a part hereof, and as by the inspection of the transcript of the record of the said district court, which was brought into the United States circuit court of appeals for the ninth circuit, by virtue of an appeal agreeably to the act of Congress in such cases made and provided, fully and at large appears, and whereas in a term of October, and in the year of our Lord one thousand eight hundred and ninety-five, the said cause came

771 on to be reheard before the said circuit court of appeals, on the said transcript of record, and was argued by counsel: On consideration whereof, it is now here ordered, adjudged, and decreed by this court that the decree of the said district court in this cause be, and the same is hereby, reversed with the costs, and the

cause is remanded to said district court for further proceedings not inconsistent with the opinion of this court.

(FEB. 10, 1896.)

You, therefore, are hereby commanded that such reversal and further proceedings be had in said cause, not inconsistent with the opinion and decree of this court, and as according to right and justice, and the laws of the United States, ought to be had, the said decree of said district court notwithstanding.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the 12th day of March, in the year of our Lord one thousand eight hundred and ninety-six.

F. D. MONCKTON,
*Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.*

*Costs of Appellants.*

| | |
|---|---|
| Clerk dist. court | $150.00 |
| Clerk C. C. app'ls | 44.70 |
| Printing record | 743.30 |
| Attorney | 20.00 |
| Taxed at | $958.00 |

F. D. MONCKTON, *Clerk.*"

Whereupon it is ordered that said mandate be filed.

772 And afterwards, to wit, on the 19th day of March, 1896, there was duly filed in said court, a motion of respondent Balfour, Guthrie & Co., for findings of fact and decree in accordance with mandate, in words and figures as follows, to wit:

In the District Court of the United States for the District of Oregon.

MALVINA SHORT, Administratrix of the Estate of Marshal B. Short, Deceased; Sven Anderson, Administrator of the Estate of John August Peterson, Deceased, and Robert Balfour, Robert Brodie Forman, Alexander Guthrie, Stephen Williamson, R. Bruce, and Walter J. Burns, Partners as Balfour, Guthrie & Co.,

*vs.*

THE BARGE "COLUMBIA," THE OREGON RAILWAY AND NAVIGATION Company, and The Oregon Short Line and Utah Northern Railway Company.

773 *Motion for Findings of Fact and Decree in Accordance with Mandate.*

Now, come Balfour, Guthrie & Co., by their solicitors, Williams, Wood & Linthicum, and move the court that findings of fact be made as to the damage sustained by said Balfour, Guthrie & Co., and that in accordance with the mandate of the United States cir-

cuit court of appeals for the ninth circuit, filed herein, a decree be entered against the Oregon Short Line and Utah Northern Railway Company, the Oregon Railway and Navigation Company, the steamer "Ocklahama," and as against the bond already filed herein by the petitioners, The Oregon Short Line and Utah Northern Railway Company.

WILLIAMS, WOOD & LINTHICUM,
*Solicitors for Balfour, Guthrie & Co.*

Due service of the within — by certified copy, as prescribed by law, is hereby admitted at ——, —— —, 189–.

WATSON, BEEKMAN & WATSON,
*Proctors for Malvina Short, Administratrix of the Estate of Marshal Short, Dec'd, and Sven Anderson, Administrator of the Estate of John August Peterson, Deceased, and Anna C. Larsen.*

W. W. COTTON,
*Proctor for O. S. L. & U. N. R'y Co. & O. R. & N.*

(Endorsed:) Filed March 19, 1896. E. D. McKee, clerk.

774 And afterwards, to wit, on the 19th day of March, 1896, there was duly filed in said court a motion of respondents Malvina Short *et al.* for findings of fact and decree, in accordance with mandate, in words and figures as follows, to wit:

In the District Court of the United States for the District of Oregon.

MALVINA SHORT, Administratrix of the Estate of Marshal B. Short, Deceased; Sven Anderson, Administrator of the Estate of John August Peterson, Deceased; Anna C. Larson, and Robert Balfour, Robert Brodie Forman, Alexander Guthrie, Partners as Balfour, Guthrie & Co.,

*vs.*

THE BARGE "COLUMBIA," THE OREGON RAILWAY AND NAVIGATION Company, and The Oregon Short Line and Utah Northern Railway Company.

775 *Motion for Findings of Fact and Decree in Accordance with Mandate.*

Now come Malvina Short, administratrix, and Sven Anderson, administrator, and Anna C. Larsen, above named, by their proctors, Watson, Beekman and Watson, and move the court that findings of fact be made as to the damage sustained by them, respectively, and that in accordance with the mandate of the United States circuit court of appeals for the ninth *district*, filed herein, a decree be entered against the Oregon Short Line and Utah Northern Railway Company, the Oregon Railway and Navigation Company, the steamer "Ocklahama," and as against the bond already filed herein

by the petitioners, The Oregon Short Line and Utah Northern Railway Company.

WATSON, BEEKMAN & WATSON,
*Proctors for Malvina Short, Administratrix; Sven Anderson, Adm'r, and Anna C. Larsen.*

Service of copy admitted, at Portland, Or., March 19th, 1896.

COX, COTTON, TEAL & MINOR,
*Proctors for Libelants and Petitioners.*
WILLIAMS, WOOD & LINTHICUM,
*Proctors for Respondents Balfour, Guthrie & Co.*

(Endorsed:) Filed March 19, 1896. E. D. McKee, clerk.

776 And afterwards, to wit, on Tuesday, the 24th day of March, 1896, the same being the 20th judicial day of the regular March term of said court—present, the Honorable Charles B. Bellinger, United States district judge, presiding—the following proceedings were had in said case, to wit:

In the District Court of the United States for the District of Oregon.

The Barge "Columbia;" The Oregon Railway and Navigation Company and The Oregon Short Line and Utah Northern Railway Company, Libelants and Petitioners; Balfour, Guthrie & Company *et al.*, Respondents. No. 3163.

*Order Setting for Hearing Motions for Findings of Fact, etc.*

MARCH 24, 1896.

Now, at this day, come the libelants and petitioners, by Mr. W. W. Cotton, of counsel, and the respondents, Balfour, Guthrie and
777 Company, by Mr. C. E. S. Wood, of counsel, and the respondents Malvina Short, *et al.*, by Mr. E. B. Watson, of counsel, and on motion of said respondents, it is ordered that this cause be, and the same is hereby, set for hearing on motions of said respondents for findings of fact, and decree on the mandate of the United States circuit court of appeals for the ninth circuit, on Monday, March 30, 1896.

And afterwards, to wit, on Monday, the 30th day of March, 1896, the same being the 25th judicial day of the regular March term of said court—present, the Honorable Charles B. Bellinger, United States district judge, presiding—the following proceedings were had in said case, to wit:

In the District Court of the United States for the District of Oregon.

The Barge "Columbia;" The Oregon Railway and Navigation Company and The Oregon Short Line and Utah Northern Railway Company, Libelants and Petitioners; Balfour, Guthrie & Company *et al.*, Respondents. No. 3163.

778 *Order Continuing Cause for Hearing.*

MARCH 30, 1896.

Now, at this day, this cause comes on to be heard upon the motions of respondents for findings of fact and decree on the mandate of the United States circuit court of appeals for the ninth circuit, the libelants and petitioners appearing by Mr. W. W. Cotton, of counsel, and the respondents Balfour, Guthrie and Company, by Mr. C. E. S. Wood, of counsel, and the respondents Malvina Short *et al.*, by Mr. E. B. Watson, of counsel; and the court having heard the arguments of counsel, on motion of said respondents, it is ordered that this cause be, and the same is hereby, continued till Thursday, April 2, 1896.

779 And afterwards, to wit, on Thursday, the 2d day of April, 1896, the same being the 28th judicial day of the regular March term of said court—present, the Honorable Charles B. Bellinger, United States district judge, presiding—the following proceedings were had in said case, to wit:

In the District Court of the United States for the District of Oregon.

The Barge "Columbia," The Oregon Railway and Navigation Company and The Oregon Short Line and Utah Northern Railway Company, Libelants and Petitioners; Balfour, Guthrie & Company *et al.*, Respondents. No. 3163.

*Hearing.*

APRIL 2, 1896.

Now, at this day, this cause comes on to be heard upon the motion of respondents for finding of fact and decree on the mandate of the United States circuit court of appeals for the ninth circuit, the libelants and petitioners appearing by Mr. W. W. Cotton, of counsel, and the respondents Balfour, Guthrie and Company,
780 by Mr. C. E. S. Wood, of counsel, and the respondents Malvina Short *et al.*, by Mr. E. B. Watson, of counsel, and the court, having heard the arguments of counsel, will advise thereof.

And afterwards, to wit, on Saturday, the 4th day of April, 1896, the same being the 30th judicial day of the regular March term of said court—present, the Honorable Charles B. Bellinger, United States district judge, presiding—the following proceedings were had in said case, to wit:

In the District Court of the United States for the District of Oregon.

The Barge "Columbia;" The Oregon Railway and Navigation Company and The Oregon Short Line and Utah Northern Railway Company, Libelants and Petitioners; Balfour, Guthrie & Company *et al.*, Respondents. No. 3163.

*Order Allowing Balfour, Guthrie & Co. to File Supplemental Answer.*

APRIL 4, 1896.

Now, at this day, on motion of Mr. C. E. S. Wood, of
781 counsel for respondents Balfour, Guthrie and Company, it is ordered that said respondents be, and they are hereby, allowed to file a supplemental answer setting out facts arising during the pendency of this suit.

And afterwards, to wit, on the 8th day of April, 1896, there was duly filed in said court a supplemental answer of Balfour, Guthrie & Company, in words and figures as follows, to wit:

In the District Court of the United States for the District of Oregon.
In Admiralty.

The Barge "Columbia;" The Oregon Railway and Navigation Company and The Oregon Short Line and Utah Northern Railway Company, Libelants and Petitioners; Malvina Short, Administratrix of the Estate of Marshal B. Short, Deceased; Sven Anderson, Administrator of the Estate of John August Peterson, Deceased; Anna C. Larsen, William Boyce, and Balfour, Guthrie & Company, Respondents.

782 *Supplemental Answer of Balfour, Guthrie & Co.*

Now come Balfour, Guthrie and Company, respondents herein, and suggest to the court the following facts, which have arisen since the institution of this suit:

Since the institution of this suit, and on the 17th day of October, 1893, in the circuit court of the United States for the ninth circuit, and district of Oregon, a bill of complaint was filed by Oliver Ames, Second, and Samuel Carr, executors of the last will and testament of Frederick L. Ames, deceased, and Peter B. Wykoff and Edwin F. Atkins, as complainants, against The Union Pacific Railway Company and others as defendants, substantially alleging, among other things, that said defendant, The Union Pacific Railway Company, was unable to meet its financial obligations, and feared attacks from its creditors, and that the said Union Pacific Railway Company was operating the transportation lines and properties of the other corporations made codefendants with it in said bill of complaint, including The Oregon Railway and Navigation Company and The Oregon Short Line and Utah Northern Railway Company, the libelants

and petitioners herein, as part of the system of transportation lines known as the Union Pacific system; and praying, among other things, that one or more receivers be appointed to take charge of such portions of said Union Pacific system as were within the territorial jurisdiction of said circuit court of the United States for the ninth circuit, and district of Oregon. And on the same day on which said suit was instituted in said court, to wit, the 17th
783 day of October, 1893, an order was made by said court therein, appointing S. H. H. Clark, Oliver W. Mink, and E. Ellery Anderson, as receivers of such portions of said Union Pacific system as were within the territorial jurisdiction of said court.

Thereafter, to wit, on the 21st day of November, 1893, an order was made by said circuit court, appointing John W. Doane and Frederic R. Coudert, as co-receivers with said Clark, Mink, and Anderson in said cause.

The said Clark, Mink, Anderson, Doane, and Coudert duly qualified as such receivers, and took charge of the transportation lines and properties aforesaid, including the transportation lines and properties of said libelants and petitioners herein, The Oregon Railway and Navigation Company and The Oregon Short Line and Utah Northern Railway Company, and proceeded to operate the same under said orders, and continued so to do, except as hereinafter set forth.

Thereafter, to wit, on the 25th day of June, 1894, and in said circuit court of the United States for the ninth circuit, and district of Oregon, a bill of complaint was filed by The Farmers' Loan and Trust Company, as complainant, against The Oregon Railway and Navigation Company, The Oregon Short Line and Utah Northern Railway Company, The Union Pacific Railway Company, and others, as defendants, substantially alleging, among other things, that said defendant The Oregon Railway and Navigation Company, one of the libelants and petitioners herein, was insolvent or in failing circumstances, and praying for the appointment of a receiver for said corporation; and on the third day of July, 1894, in said court
784 and in the cause initiated by the filing of said last mentioned bill, Edwin McNeill was appointed receiver of said Oregon Railway and Navigation Company. And the said McNeill thereafter duly qualified as such receiver, and the transportation lines and properties of said Oregon Railway and Navigation Company were thereupon surrendered to him by said prior receivers, Clark, Mink, Anderson, Doane, and Coudert. Said McNeill ever since has been, and is now, such receiver; and said suit of The Farmers' Loan and Trust Company against The Oregon Railway and Navigation Company and others is still pending and undetermined in said circuit court.

Thereafter, to wit, on the first day of September, 1894, and in said circuit court of the United States for the ninth judicial circuit, and district of Oregon, a bill of complaint was filed by John F. Dillon, as trustee, complainant, against The Oregon Short Line and Utah Northern Railway Company, The Union Pacific Railway Company, The American Loan and Trust Company, and the said Clark, Mink,

Anderson, Doane, and Coudert, as defendants, praying, among other things, that receivers be appointed to take charge of the transportation lines and properties of said Oregon Short Line and Utah Northern Railway Company. And on said first day of September, 1894, in said court and in the cause initiated by the filing of said last-mentioned bill, the said S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, John W. Doane, and Frederick R. Coudert were appointed receivers of said Oregon Short Line and Utah Northern Railway Company; and they thereupon duly qualified as, and ever since have been and are now, such receivers.

785 And said respondents herein, Balfour, Guthrie & Co., hereby respectfully refer to the pleadings, orders, and proceedings in said suits of Oliver Ames, Second, and others, against The Union Pacific Railway Company and others, and The Farmers' Loan and Trust Company against The Oregon Railway and Navigation Company and others, and John F. Dillon, trustee, against The Oregon Short Line and Utah Northern Railway Company and others, as if the same were specially pleaded and incorporated herein and made a part hereof.

The steamboat "Ocklahama," mentioned in the pleadings herein, and the master and crew of which had the said barge "Columbia" in their charge at the time of the accident described in the libel and petition herein, is now in the custody and possession of the said Edwin McNeill, as receiver of the said Oregon Railway and Navigation Company.

Wherefore, said respondents, Balfour, Guthrie & Co., pray that the libellants and petitioners herein, The Oregon Railway and Navigation Company, and The Oregon Short Line and Utah Northern Railway Company, be required forthwith to file a new and additional stipulation herein for the appraised value of the said steamboat "Ocklahama" at the time of the accident hereinbefore referred to, together with legal interest on said amount to date, or to surrender to these respondents, as trustees, for the benefit of whom it may concern, on the final decree and apportionment of this court, *to* said steamboat "Ocklahama," together with her tackle, apparel, furniture, boilers, engines, and appurtenances.

WILLIAMS, WOOD & LINTHICUM,
*Attorneys for said Respondents, Balfour, Guthrie & Co.*

786 UNITED STATES OF AMERICA, } ss:
*State and District of Oregon, County of Multnomah,* }

I, W. J. Burns, being first duly sworn, on my oath say that I am a member of the firm of Balfour, Guthrie & Co., respondents in said cause, named in the foregoing supplemental answer; that I know the contents of said answer, and that said answer is true, as I verily believe.

W. J. BURNS.

Subscribed and sworn to before me, this 6th day of April, 1896.
[SEAL.]
H. H. PARKER,
*Notary Public in and for Oregon.*

Without waiving any objection to the manner of service or the jurisdiction of the court over the subject-matter or the parties, it — hereby admitted that a copy of the foregoing supplemental answer was delivered to the undersigned at Portland, Oregon, April 6, 1896.

COX, COTTON, TEAL & MINOR,
*Proctors for Libellants and Petitioners.*

(Endorsed:) Filed April 8, 1896. E. D. McKee, clerk.

787 And afterwards, to wit, on the 13th day of April, 1896, there *was* duly filed in said court exceptions of Oregon Railway and Navigation Company to supplemental answer of Balfour, Guthrie & Co., in words and figures as follows, to wit:

In the District Court of the United States for the District of Oregon.

The Barge "Columbia;" The Oregon Railway and Navigation Company and The Oregon Short Line and Utah Northern Railway Company, Petitioners; Malvina Short, Administratrix of the Estate of Marshal B. Short, Deceased; Sven Anderson, Administrator of the Estate of John August Peterson, Deceased; Anna C. Larsen, William Boyce, and Balfour, Guthrie & Co., Respondents.

*Exceptions of O. R. & N. Co. to Supplemental Answer of Balfour, Guthrie & Co.*

788 Now comes The Oregon Railway and Navigation Company, one of the petitioners herein, and for its exceptions to the supplemental answer of Balfour, Guthrie & Co. alleges as follows:

First. The petitioner excepts to said supplemental answer for the reason that this cause was remanded to this court for further proceedings in accordance with the opinion of the circuit court of appeals of the United States for the ninth circuit, and that this court is without jurisdiction to hear and determine the matters presented by said supplemental answer.

Second. The petitioner excepts to the said supplemental answer for the reason that this cause was remanded to this court for further proceedings in accordance with the opinion of the circuit court of appeals, and that this *cause* has no jurisdiction to hear and determine the matters presented by said petition, or to grant the relief, or any part of the same, prayed for in said supplemental answer.

Third. The petitioner excepts to said supplemental answer for the reason that this court has no jurisdiction over the steamer "Ocklahama," or over the value of said steamer.

Fourth. The petitioner excepts to said supplemental answer for the reason that the relief prayed for in said supplemental answer is not in accordance with the opinion of the circuit court of appeals in this proceeding, and is inconsistent therewith.

Fifth. The petitioner excepts to said supplemental answer for the

reason that under the act of Congress to limit the liability of ship-
owners this petitioner, in order to limit its liability, is not
789 obliged to pay into court the appraised value of said steamer
"Ocklahama," or is not obliged to turn over to trustees the
said steamer.

COX, COTTON, TEAL & MINOR,
*Attorneys for the Petitioner The Oregon Railway and Navigation Company.*

Service by copy admitted at Portland, Ore., Apr. 13, 1896.
C. E. S. WOOD,
*Attorney for Pl'ff.*

(Endorsed:) Filed April 13, 1896. E. D. McKee, clerk.

790 And afterwards, to wit, on the 13th day of April, 1896, there *was* duly filed in said court exceptions of the Oregon Short Line and Utah Northern Railway Company to supplemental answer of Balfour, Guthrie & Co., in words and figures as follows, to wit:

In the District Court of the United States for the District of Oregon.

The Barge "Columbia;" The Oregon Railway and Navigation Company and The Oregon Short Line and Utah Northern Railway Company, Petitioners; Malvina Short, Administratrix of the Estate of Marshal B. Short, Deceased; Sven Anderson, Administrator of the Estate of John August Peterson, Deceased; Anna C. Larsen, William Boyce, and Balfour, Guthrie & Co., Respondents.

*Exceptions of Oregon S. L. & U. N. R'y Co. to Supplemental Answer of Balfour, Guthrie & Co.*

Now comes The Oregon Short Line and Utah Northern
791 Railway Company, one of the petitioners herein, and for its
exceptions to the supplemental answer of Balfour, Guthrie
& Co. alleges as follows:

First. The petitioner excepts to said supplemental answer for the reason that this cause was remanded to this court for further proceedings in accordance with the opinion of the circuit court of appeals of the United States for the ninth circuit, and that this court is without jurisdiction to hear and determine the matters presented by said supplemental answer.

Second. The petitioner excepts to the said supplemental answer for the reason that this cause was remanded to this court for further proceedings in accordance with the opinion of the circuit court of appeals, and that this *cause* has no jurisdiction to hear and determine the matters presented by said petition or to grant the relief, or any part of the same, prayed for in said supplemental answer.

Third. The petitioner excepts to said supplemental answer for the reason that this court has no jurisdiction over the steamer "Ocklahama," or over the value of said steamer.

Fourth. The petitioner excepts to said supplemental answer for the reason that the relief prayed for in said supplemental answer is not in accordance with the opinion of the circuit court of appeals in this proceeding, and is inconsistent therewith.

Fifth. The petitioner excepts to said supplemental answer for the reason that under the act of Congress to limit the liability of ship-
owners this petitioner, in order to limit its liability, is not
792 obliged to pay into court the appraised value of said steamer "Ocklahama," or is not obliged to turn over to trustees the said steamer.

COX, COTTON, TEAL & MINOR,
*Attorneys for the Petitioner The Oregon Short Line and Utah Northern Railway Company.*

Service by copy admitted at Portland, Ore., Apr. 13, 1896.
C. E. S. WOOD,
*Attorney for Pl'ff.*

(Endorsed:) Filed April 13, 1896. E. D. McKee, clerk.

And afterwards, to wit, on Saturday, the 18th day of April, 1896, the same being the 42d judicial day of the regular March term of said court—present, the Honorable Charles B. Bellinger, United States district judge, presiding—the following proceedings were had in said case, to wit:

In the District Court of the United States for the District of Oregon.

The Barge "Columbia;" The Oregon Railway and Navigation Company and The Oregon Short Line and Utah Northern Railway Company, Libelants and Petitioners; Balfour, Guthrie & Company *et al.*, Respondents. No. 3163.

793 *Order Overruling Exceptions to Supplemental Answer of Balfour, Guthrie & Co., etc.*

APRIL 18, 1896.

Now, at this time, comes on to be heard the exceptions of the Oregon Railway and Navigation Company to the supplemental answer of Balfour, Guthrie & Company herein, and the court having heard Mr. W. W. Cotton, attorney for the Oregon Railway and Navigation Company, in support of the exceptions, and Mr. C. E. S. Wood, attorney for Balfour, Guthrie & Company, and Mr. E. B. Watson, attorney for Malvina Short, administratrix, against the exceptions, and being fully advised in the premises, it is hereby ordered that each of said exceptions be overruled, and that the Oregon Railway and Navigation Company have thirty days in which to file a reply to said supplemental answer.

794 And afterwards, to wit, on the 16th day of May, 1896, there was duly filed in said court a motion of Balfour, Guthrie & Co. for order for process to issue for arrest of the "Ocklahama," in words and figures as follows, to wit:

In the District Court of the United States for the District of Oregon.

The Barge "Columbia," Her Tackle, etc.; The Oregon Railway and Navigation Co. *et al.*, Libelants and Petitioners; Malvina Short, Administratrix, etc., *et al.*, Respondents.

*Motion for Order for Process to Issue for Arrest of the "Ocklahama."*

Now come Balfour, Guthrie & Co., respondents herein, and move the court that process — directing the United States marshal for the district of Oregon to seize and hold the steamboat "Ocklahama," her tackle, apparel, furniture, engines, boilers, and appurtenances, for the benefit of the respondents herein, as their several interests may appear.

And said respondents, Balfour, Guthrie & Co., show to the
795 court the order of the circuit court of the United States for the district of Oregon, filed May 12, 1896, in the suit of The Farmers' Loan and Trust Company against The Oregon Railway and Navigation Company and others, permitting the process herein moved for to issue as aforesaid, notwithstanding the fact that said steamboat "Ocklahama" is in the hands of a receiver of said circuit court in said suit, and, as a part of this motion, filed herewith a duly certified copy of said order of said circuit court.

WILLIAMS, WOOD & LINTHICUM,
*Proctors for Balfour, Guthrie & Co., Respondents.*

In the Circuit Court of the United States for the District of Oregon.

THE FARMERS' LOAN AND TRUST COMPANY
*vs.*
OREGON RAILWAY AND NAVIGATION CO. ET AL. } No. 2135.

*Order.*

MAY 12, 1896.

At this time came on to be heard the exceptions of Edwin McNeill, receiver, to the petition of Balfour, Guthrie & Co., for leave to make Edwin McNeill, receiver, a party to the cause now pending in the district court of the United States for the district of Oregon,
796 wherein The Oregon Short Line and Utah Northern Railway Company and The Oregon Railway and Navigation Company are libelants and petitioners, and the petitioners herein, Balfour, Guthrie & Co., and others, are respondents, being a suit to limit the liability of the said companies, petitioners in the matter of a collision involving the barge "Columbia" and the steamboat "Ocklahama," and Mr. W. W. Cotton appearing for the receiver, Edwin McNeill, and Mr. C. E. S. Wood appearing for the petitioners, Balfour, Guthrie & Co., and the court being fully advised in the premises:

It is hereby ordered that the prayer of said petition for leave to join said Edwin McNeill, receiver, as a party to said suit, and that, meanwhile, he hold and operate said "Ocklahama" for the use and

benefit of the petitioner, be denied; but it is further ordered that the petitioners have leave, upon due process issued out of and by the district court of the United States for this district, in said suit of the Oregon Short Line and Utah Northern Railway Company and the Oregon Railway and Navigation Company, to seize and proceed against said steamboat "Ocklahama," her tackle, apparel, and appurtenances, without prejudice, however, to the right of any person, claiming an interest in said boat, to appear in said proceedings in the district court, and present their said claims as the same may appear.

CHARLES B. BELLINGER, *Judge.*

(Endorsed:) Filed May 12, 1896. J. A. Sladen, clerk.

797 UNITED STATES OF AMERICA, } *ss:*
*District of Oregon,* }

I, J. A. Sladen, clerk of the United States circuit court for the district of Oregon, do hereby certify that the foregoing copy of order of May 12, 1896, in cause No. 2135, The Farmers' Loan and Trust Co. *v.* Oregon Railway and Navigation Company *et al.*, has been by me compared with the original thereof, and that it is a correct transcript therefrom, and of the whole of such original, as the same appears of record and on file at my office and in my custody.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at Portland, in said district, this May 15, 1896.

[SEAL.] J. A. SLADEN, *Clerk.*

Due service of the within motion by certified copy, as prescribed by law, is hereby admitted at Portland, Oregon, May 16, 1896.

COX, COTTON, TEAL & MINOR,
*Proctors for O. R. & N. Co. and O. S. L. & P. N. R. Co., Libelants and Petitioners.*

(Endorsed:) Filed May 16, 1896. E. D. McKee, clerk.

798 And afterwards, to wit, on Friday, the 22d day of May, 1896, the same being the 71st judicial day of the regular March term of said court—present, the Honorable Charles B. Bellinger, United States district judge, presiding—the following proceedings were had in said case, to wit:

In the District Court of the United States for the District of Oregon.

The Barge "Columbia;" The Oregon Railway and Navigation Company *et al.*, Libelants and Petitioners; Balfour, Guthrie & Company, Respondents. No. 3163.

*Order Vacating Order of April* 18, 1896, *etc.*

MAY 22, 1896.

Now, at this day, comes the libelant and petitioner by Mr. W. W. Cotton, of counsel, and Balfour, Guthrie and Company, respondents herein, by Mr. C. E. S. Wood, of counsel, and, on motion of said libelants and petitioners, it is ordered that the order heretofore entered herein on April 18, 1896, be, and the same is hereby, rescinded, and that the exceptions in said order mentioned be, and the same are hereby, sustained. And on motion of said respondents
it is ordered that they be, and they are hereby, allowed to
799 file an amended and supplemental answer herein. And thereupon, this cause comes on to be heard upon the motion of said respondent for an order directing the marshal to seize the steamboat "Ocklahama," her tackle, apparel, and appurtenances, and was argued by Mr. W. W. Cotton, of counsel for said libelants and petitioners, and by Mr. C. E. S. Wood, of counsel for said respondents, on consideration whereof, it is ordered and adjudged that said motion be, and the same is hereby, denied for the reason that no special or particular order of the court is required to warrant the marshal, as part of the proceedings in this cause, to seize and hold said steamboat, her tackle, apparel, and appurtenances; and it is further ordered that either party in interest may apply to the court for such other order, or to have such other proceeding in the case as may be proper under the mandate of the appellate court or the rules and practice of admiralty.

800 And afterwards, to wit, on the 28th day of May, 1896, there was duly filed in said court an amended supplemental answer of respondents Balfour, Guthrie & Company, in words and figures as follows, to wit:

In the District Court of the United States for the District of Oregon.
In Admiralty.

The Barge "Columbia;" The Oregon Railway and Navigation Company and The Oregon Short Line and Utah Northern Railway Company, Libelants and Petitioners; Malvina Short, Administratrix of the Estate of Marshal B. Short, Deceased; Sven Anderson, Administrator of the Estate of John August Peterson, Deceased; Anna C. Larsen, William Boyce, and Balfour, Guthrie & Co., Respondents.

*Amended Supplemental Answer of Balfour, Guthrie & Co.*

Now comes Balfour, Guthrie & Company, respondents herein, and, by leave of the court first had and obtained, present to

801 the court this, their amended supplemental answer to the libel and petition herein, and suggest to the court the following facts, which have arisen since the institution of this suit:

Since the institution of this suit, and on the 17th day of October, 1893, in the circuit court of the United States for the ninth circuit, and district of Oregon, a bill of complaint was filed by Oliver Ames, Second, and Samuel Carr, executors of the last will and testament of Frederick L. Ames, deceased, and Peter B. Wyckoff and Edwin F. Atkins, as complainants, against The Union Pacific Railway Company and others as defendants, substantially alleging, among other things, that said defendant The Union Pacific Railway Company was unable to meet its financial obligations, and feared attacks from its creditors, and that said The Union Pacific Railway Company was operating the transportation lines and properties of the other corporations made codefendants with it in said bill of complaint, including The Oregon Railway and Navigation Company and The Oregon Short Line and Utah Northern Railway Company the libellants and petitioners herein, as parts of the system of transportation lines known as the Union Pacific system; and praying, among other things, that one or more receivers be appointed to take charge of such portions of said Union Pacific system as were within the territorial jurisdiction of said circuit court of the United States for the ninth circuit, and district of Oregon. And on the same day on which said suit was instituted in said court, to wit, the 17th day of October, 1893, an order was made by said court therein, appointing S. H. H. Clark, Oliver W. Mink, and

802 E. Ellery Anderson as receivers of such portions of said Union Pacific system as were within the territorial jurisdiction of said court.

Thereafter, to wit, on the 21st day of November, 1893, an order was made by said circuit court, appointing John W. Doane and Frederic R. Coudert as co-receivers with said Clark, Mink, and Anderson in said cause.

The said Clark, Mink, Anderson, Doane, and Coudert duly qualified as such receivers, and took charge of the transportation lines and properties as aforesaid, including the transportation lines and properties of said libelants and petitioners herein, The Oregon Railway and Navigation Company and The Oregon Short Line and Utah Northern Railway Company, and proceeded to operate the same under said orders, and continued so to do except as hereinafter set forth.

Thereafter, to wit, on the 25th day of June, 1894, and in said circuit court of the United States for the ninth circuit, and district of Oregon, a bill of complaint was filed by The Farmers' Loan and Trust Company, as complainant, against The Oregon Railway and Navigation Company, The Oregon Short Line and Utah Northern Railway Company, The Union Pacific Railway Company, and others, as defendants, substantially alleging, among other things, that said Oregon Railway and Navigation Company, one of the libelants and petitioners herein, was insolvent or in failing circumstances, and praying for the appointment of a receiver for said cor-

poration; and on the third day of July, 1894, in said court and in the cause initiated by the filing of said last-mentioned bill, Edwin McNeill was appointed receiver of said Oregon Railway and Navigation Company. And the said McNeill thereafter duly
803 qualified as such receiver, and the transportation lines and properties of said Oregon Railway and Navigation Company were thereupon surrendered to him by said prior receivers, Clark, Mink, Anderson, Doane, and Coudert. Said McNeill ever since has been, and is now, such receiver; and said suit of The Farmers' Loan and Trust Company against The Oregon Railway and Navigation Company and others is still pending and undetermined in said circuit court.

Thereafter, to wit, on the first day of September, 1894, and in said circuit court of the United States for the ninth judicial circuit, and district of Oregon, a bill of complaint was filed by John F. Dillon, as trustee, complainant, against The Oregon Short Line and Utah Northern Railway Company, The Union Pacific Railway Company, The American Loan and Trust Company, and the said Clark, Mink, Anderson, Doane, and Coudert, as defendants, praying among other things, that receivers be appointed to take charge of the transportation lines and properties of said Oregon Short Line and Utah Northern Railway Company. And on said first day of September, 1894, in said court and in the cause initiated by the filing of said last-mentioned bill, the said S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, John W. Doane, and Frederic R. Coudert were appointed receivers of said Oregon Short Line and Utah Northern Railway Company; and they thereupon duly qualified as such receivers.

And said respondents herein, Balfour, Guthrie & Co., hereby specially refer to the pleadings, orders, and proceedings in said suit, of Oliver Ames, Second, and others, against The Union Pa-
804 cific Railway Company and others, and The Farmers' Loan and Trust Company against The Oregon Railway and Navigation Company and others, and John F. Dillon, trustee, against The Oregon Short Line and Utah Northern Railway Company and others, as if the same were specially pleaded and incorporated herein and made a part hereof.

The steamboat "Ocklahama," mentioned and described in the libel and petition and in the several answers and other pleadings herein, is now in the custody and possession of the said Edwin McNeill, as receiver of the said Oregon Railway and Navigation Company.

Wherefore, said respondents, Balfour, Guthrie & Company, pray that the libelants and petitioners herein, The Oregon Railway and Navigation Company, and The Oregon Short Line and Utah Northern Railway Company, be required to file forthwith a new and additional stipulation herein for the appraised value of the said steamboat "Ocklahama" at the time of the accident mentioned and described in the libel and petition and in the several answers and other pleadings herein, together with legal interest on said amount to date, or to surrender to these respondents, as trustees, for the

benefit of whom it may concern, on the final decree and apportionment of this court, the said steamboat "Ocklahama," together with her tackle, apparel, furniture, boilers, engines, and appurtenances. And said respondents also pray for such other, further, and different relief as to the court may seem equitable and meet.

WILLIAMS, WOOD & LINTHICUM,
*Attorneys for said Respondents, Balfour Guthrie & Company.*

805 UNITED STATES OF AMERICA, } ss:
*State and District of Oregon, County of Multnomah,* }

I, W. J. Burns, being first duly sworn, on my oath say that I am a member of the firm of Balfour, Guthrie & Company, respondents in said cause, named in and making the foregoing amended supplemental answer; that I know the contents of said answer, and that said answer is true, as I verily believe.

W. J. BURNS.

Subscribed and sworn to before me this 25th day of May, 1896.
[SEAL.]
T. W. LONDON,
*Notary Public in and for Oregon.*

Due service of the within answer by certified copy, as prescribed by law is hereby admitted at Portland, Oregon, May 26, 1896.

W. W. COTTON,
*Proctor for Libelants and Petitioners.*

(Endorsed:) Filed May 28, 1896. E. D. McKee, clerk.

806 And afterwards, to wit, on the 28th day of May, 1896, there was issued out of said court a warrant for the arrest of the steamboat "Ocklahama," in words and figures as follows, to wit:

*Warrant for Arrest of Steamboat "Ocklahama."*

COUNTY OF MULTNOMAH, } ss:
*State of Oregon,* }

I, C. A. Morden, being first duly sworn, say that I am the foreman of the printer of "The Morning Oregonian" newspaper; that said "Morning Oregonian" is a daily newspaper published in said county and State and has a general circulation therein; and that an advertisement, of which the annexed, marked "X," is a true copy, was published in said "Morning Oregonian" for fifteen insertions, daily, from the 9th day of June, A. D. 1896, to the 25th day of June, A. D. 1896, inclusive, and appeared in the following issues of said newspaper, to wit: June 9, 10, 11, 12, 13, 15, 16, 17, 18, 19, 20, 22, 23, 24, 25, and that during said term said paper was regularly circulated.

CHAS. A. MORDEN, *Foreman.*

Subscribed and sworn to before me, a notary public in and for the county of Multnomah, State of Oregon, this 29th day of June, A. D. 1896.

[SEAL.] WM. H. McDONALD,
*Notary Public for Oregon.*

807 "X."

In the District Court of the United States for the District of Oregon.

The Barge "Columbia;" The Oregon Railway & Navigation Company and The Oregon Short Line & Utah Northern Railway Company, Libelants and Petitioners; Malvina Short, Administrator of the Estate of Marshal B. Short, Deceased; Sven Anderson, Administrator of the Estate of John August Peterson, Deceased; Anna C. Larsen, William Boyce, and Balfour, Guthrie & Company, Respondents. No. 3163.

*Citation.*

UNITED STATES OF AMERICA, } ss:
*District of Oregon,* }

Under and in pursuance of an order, and due and regular process, in the above-entitled court and cause, I did, on the 28th day of May, 1896, seize that certain steamboat (prior to such seizure in the possession of said libelant and petitioner, The Oregon Railway & Navigation Company), called the "Ocklahama," her tackle, apparel, furniture, engines, boilers, boats and appurtenances, and the same is now in my possession; and I do hereby give notice, generally, unto all persons having or pretending to have, any right, title or interest in the said steamboat "Ocklahama," her tackle, apparel, furniture, engines, boilers, boats and appurtenances, to appear before the said court, in the city of Portland, in said district, on the 6th day of July next (if it be a court day, or else on the next court day thereafter), at 10 o'clock in the forenoon of said day, then and there to make known their claims and allegations in said matter.

Dated at Portland, in said district, this 8th day of June, A. D. 1896.

H. C. GRADY,
*United States Marshal for the District of Oregon.*

808 *Return.*

UNITED STATES OF AMERICA, } ss:
*District of Oregon,* }

In obedience to the command of the within writ I did, on the 28th day of May, 1896, at the port of Portland, in the district of Oregon, arrest the within-named vessel, the "Ocklahama," in the hands of E. McNeill, receiver of the O. R. & N. Co., by going on board of her and seizing and arresting her, and taking said vessel into my custody, together with her tackle, apparel, and furniture; and I served

a duly certified copy of this writ at said time upon S. Colsen, who is captain of said vessel and in charge thereof; I also posted a duly certified copy thereof in a public place in plain view on said vessel; I further caused to be published in the "Daily Oregonian," in the said district of Oregon, for fifteen consecutive publications, exclusive of Sundays, commencing on the 9th day of June, 1896, the following notice and citation hereto affixed and a part of this return:

In the District Court of the United States for the District of Oregon.

The Barge "Columbia;" The Oregon Railway and Navigation Company and The Oregon Short Line and Utah Northern Railway Company, Libelants and Petitioners; Malvina Short, Administrator of the Estate of Marshal B. Short, Deceased; Sven Anderson, Administrator of the Estate of John August Peterson, Deceased; Anna C. Larsen, William Boyce, and Balfour, Guthrie & Company, Respondents. No. 3163.

*Citation.*

UNITED STATES OF AMERICA, } ss:
*District of Oregon,* }

809 Under and in pursuance of an order, and due and regular process, in the above-entitled court and cause, I did, on the 28th day of May, 1896, seize that certain steamboat (prior to such seizure in the possession of said libelant and petitioner, The Oregon Railway & Navigation Company), called the "Ocklahama," her tackle, apparel, furniture, engines, boilers, boats and appurtenances, and the same is now in my possession; and I do hereby give notice, generally, unto all persons having or pretending to have, any right, title or interest in the said steamboat "Ocklahama," her tackle, apparel, furniture, engines, boilers, boats and appurtenances, to appear before the said court, in the city of Portland, in said district, on the 6th day of July next (if it be a court day, or else on the next court day thereafter), at 10 o'clock in the forenoon of said day then and there to make known their claims and allegations in said matter.

Dated at Portland, in said district, this 8th day of June, A. D. 1896.

H. C. GRADY,
*United States Marshal for the District of Oregon.*

No bond having been given as yet for the release of said vessel, I have the said vessel, the "Ocklahama," now in my custody.

Dated at Portland, Oregon, this 29th day of June, 1896.

HENRY C. GRADY,
*U. S. Marshal.*
By GEO. HUMPHREY, *Deputy.*

810 *Warrant of Arrest and Monition.*

UNITED STATES OF AMERICA, }
*District of Oregon,* } ss:

The President of the United States of America to the marshal of the district of Oregon or his deputy, Greeting:

You are hereby strictly enjoined and commanded that you arrest the vessel called the "Ocklahama," whereof —— —— now is, or lately was, master, her boats, tackle, apparel, and furniture, if she shall be found within your district, and the same so arrested you keep under safe and secure arrest until you shall receive further orders from the court or the same shall be discharged in due course of law, and that you cite at the premises all persons in general who have or pretend to have any right, title, or interest therein, to appear before the judge of the district court of the United States for the district of Oregon, at the city of Portland, on the 6th day of July, A. D. 1896, if it be a court day, or else on the court day next following, at ten o'clock in the forenoon of such day, then and there to answer unto Balfour, Guthrie & Co., and others, in the cause of damages, civil and maritime, and further to do and receive in this behalf as to justice shall appertain, and that you duly certify the court aforesaid what you shall do in the premises, together with these presents.

Witness the Honorable Charles B. Bellinger, judge of said
811 court, and the seal thereof, hereto affixed, at Portland, in said district, on the 28th day of May, A. D. 189–.

[SEAL.] E. D. McKEE, *Clerk,*
By G. H. MARSH,
*Deputy Clerk.*

(Endorsed:) Returned and filed June 29, 1896. E. D. McKee, clerk.

812 And afterwards, to wit, on the 29th day of May, 1896, there was duly filed in said court exceptions of the Oregon Railway and Navigation Company to amended supplemental answer of Balfour, Guthrie & Co. in words and figures as follows, to wit:

In the District Court of the United States for the District of Oregon.
In Admiralty.

The Barge "Columbia;" The Oregon Railway and Navigation Company, and The Oregon Short Line and Utah Northern Railway Company, Petitioners; Malvina Short, Administratrix of the Estate of Marshal B. Short, Deceased; Sven Anderson, Administrator of the Estate of John August Peterson, Deceased; Anna C. Larsen, William Boyce, and Balfour, Guthrie & Co., Respondents.

*Exceptions of O. Ry & N. Co. to Amended Supplemental Answer of Balfour, Guthrie & Co.*

Now comes The Oregon Railway and Navigation Company, one of the petitioners herein, and for its exceptions to the amended supplemental answer alleges as follows:

813 First. The petitioner excepts to said amended supplemental answer for the reason that this cause was remanded to this court for further proceedings in accordance with the opinion of the circuit court of appeals of the United States for the ninth circuit, and that this court is without jurisdiction to hear and determine the matters presented by said amended supplemental answer.

Second. The petitioner excepts to the said amended supplemental answer for the reason that this cause was remanded to this court for further proceedings in accordance with the opinion of the circuit court of appeals, and that this court has no jurisdiction to hear and determine the matters presented by said petition or to grant the relief or any part of the same, prayed for in said amended supplemental answer.

Third. The petitioner excepts to said amended supplemental answer for the reason that this court has no jurisdiction over the steamer "Ocklahama," or over the value of said steamer.

Fourth. The petitioner excepts to said amended supplemental answer for the reason that the relief prayed for in said amended supplemental answer is not in accordance with the opinion of the circuit court of appeals in this proceeding, and inconsistent therewith.

Fifth. The petitioner excepts to said amended supplemental answer for the reason that under the act of Congress to limit the liability of ship-owners this petitioner, in order to limit its liability, is not obliged to pay into court the appraised value of said

814 steamer "Ocklahama," or is not obliged to turn over to trustees the said steamer.

COX, COTTON, TEAL & MINOR,
*Proctors for the Petitioner, The Oregon Railway and Navigation Company.*

Service of copy admitted at Portland, Oregon, May 28, 1896.

WILLIAMS, WOOD & LINTHICUM,
*Attorneys for Balfour, Guthrie & Co., Respondents.*

(Endorsed:) Filed May 29, 1896. E. D. McKee, clerk.

815 And afterwards, to wit, on the 29th day of May, 1896, there was duly filed in said court exceptions of Oregon Short Line and Utah Northern Railway Company to amended supplemental answer of Balfour, Guthrie & Co., in words and figures as follows, to wit:

In the District Court of the United States for the District of Oregon.
In Admiralty.

The Barge "Columbia;" The Oregon Railway and Navigation Company and The Oregon Short Line and Utah Northern Railway Company, Petitioners; Malvina Short, Administratrix of the Estate of Marshal B. Short, Deceased; Sven Anderson, Administrator of the Estate of John August Peterson, Deceased; Anna C. Larsen, William Boyce, and Balfour, Guthrie & Co., Respondents.

*Exceptions of O. S. L. & U. N. R. Co. to Amended Supplemental Answer of Balfour, Guthrie & Co.*

816 Now comes The Oregon Short Line and Utah Northern Railway Company, one of the petitioners herein, and for its exceptions to the amended supplemental answer alleges as follows:

First. The petitioner excepts to said amended supplemental answer for the reason that this cause was remanded to this court for further proceedings in accordance with the opinion of the circuit court of appeals of the United States for the ninth circuit, and that this court is without jurisdiction to hear and determine the matters presented by said amended supplemental answer.

Second. The petitioner excepts to the said amended supplemental answer for the reason that this cause was remanded to this court for further proceedings in accordance with the opinion of the circuit court of appeals, and that this court has no jurisdiction to hear and determine the matters presented by said petition or to grant the relief, or any part of the same, prayed for in said amended supplemental answer.

Third. The petitioner excepts to said amended supplemental answer for the reason that this court has no jurisdiction over the steamer "Ocklahama," or over the value of said steamer.

Fourth. The petitioner excepts to said amended supplemental answer for the reason that the relief prayed for in said amended supplemental answer is not in accordance with the opinion of the circuit court of appeals in this proceeding, and is inconsistent therewith.

Fifth. The petitioner excepts to said amended supplemental answer for the reason that under the act of Congress to limit the lia-

bility of ship-owners this petitioner, in order to limit its
817 liability, is not obliged to pay into court the appraised value of said steamer "Ocklahama," or is not obliged to turn over to trustees the said steamer.

COX, COTTON, TEAL & MINOR,
*Proctors for the Petitioner The Oregon Short Line and Utah Northern Railway Company.*

Service by copy admitted at Portland, Oregon, May 28, 1896.
WILLIAMS, WOOD & LINTHICUM,
*Attorneys for Balfour, Guthrie & Co., Respondents.*

(Endorsed:) Filed May 29, 1896. E. D. McKee, clerk.

And afterwards, to wit, on Saturday, the 6th day of June, 1896, the same being the 84th judicial day of the regular March term of said court—present, the Honorable Charles B. Bellinger, United States district judge, presiding—the following proceedings were had in said case, to wit:

In the District Court of the United States for the District of Oregon.

The Barge "Columbia;" The Oregon Railway and Navigation Company *et al.*, Libelants and Petitioners; Balfour, Guthrie & Co. *et al.*, Respondents. No. 3163.

818 *Order Sustaining Exceptions to Supplemental Answer of Balfour, Guthrie & Co.*

JUNE 6, 1896.

Now, at this day, come the respondents, Balfour, Guthrie & Co., by Mr. C. E. S. Wood of counsel, and thereupon this cause comes on to be heard upon the exceptions to the amended and supplemental answer of said respondents, on consideration whereof it is ordered and adjudged that said exceptions be, and the same are hereby, sustained.

819 And afterwards, to wit, on the 8th day of June, 1896, there was duly filed in said court a motion of the respondents Balfour, Guthrie & Co. for order to sell the steamboat "Ocklahama," in words and figures as follows, to wit:

In the District Court of the United States for the District of Oregon.
In Admiralty.

The Barge "Columbia;" The Oregon Railway and Navigation Company and The Oregon Short Line and Utah Northern Railway Company, Libelants and Petitioners; Malvina Short, Administratrix of the Estate of Marshal B. Short, Deceased, *et al.*, Respondents.

*Motion for Order to Sell Steamboat "Ocklahama."*

Now comes Balfour, Guthrie & Company, respondents herein, and move the court that an order be made and entered herein, directing

that the steamboat "Ocklahama," her tackle, apparel, furni-
820 ture, engines, boilers, boats and appurtenances now in the custody of the United States marshal for the district of Oregon, under and by virtue of an order and due and regular process herein, be sold at public sale by the said marshal, and that the proceeds of such sale, after deducting the proper costs and expenses thereof, be deposited in the registry of this court, for such disposition as the court shall direct.

WILLIAMS, WOOD & LINTHICUM,
*Proctors for Balfour, Guthrie & Co., Respondents.*

Due service of the within motion by certified copy, as prescribed by law, is hereby admitted at Portland, Oregon, June 8, 1896.

COX, COTTON, TEAL & MINOR,
*Proctors for Oregon Short Line and Utah Northern Ry Co. and Oregon Railway and Navigation Company.*

(Endorsed:) Filed June 8, 1896. E. D. McKee, clerk.

821 And afterwards, to wit, on Friday, the 19th day of June, 1896, the same being the 95th judicial day of the regular March term of said court—present, the Honorable Charles B. Bellinger, United States district judge, presiding—the following proceedings were had in said case, to wit:

In the District Court of the United States for the District of Oregon.

The Barge "Columbia;" The Oregon Railway and Navigation Co. *et al.*, Libelants and Petitioners; Balfour, Guthrie & Co. *et al.*, Respondents. No. 3163.

*Order Denying Motion for Order to Sell the "Ocklahama."*

JUNE 18, 1896.

Now, at this day, come the libelants and petitioners, by Mr. W. W. Cotton, of counsel, and the respondents Balfour, Guthrie & Company, by Mr. C. E. S. Wood, of counsel, and thereupon this cause comes on to be heard upon the motion of said respondents for an order directing the United States marshal to sell the steamboat "Ocklahama," which steamboat is now in the custody of said marshal by virtue of a warrant issued in this cause, on con-
822 sideration whereof it is ordered and adjudged that said motion be, and the same is hereby, denied, with leave to said respondents to renew said motion after the return day of said warrant.

And afterwards, to wit, on the 16th day of July, 1896, there was duly filed in said court a motion of respondents Balfour, Guthrie & Co. to sell steamboat "Ocklahama," and notice to set motion for hearing, in words and figures as follows, to wit:

In the District Court of the United States for the District of Oregon.
In Admiralty.

The Barge "Columbia;" The Oregon Railway and Navigation Company and The Oregon Short Line and Utah Northern Railway Company, Libelants and Petitioners; Malvina Short, Administratrix of the Estate of Marshal B. Short, Deceased, *et al.*, Respondents.

823 *Motion for Order to Sell Steamboat "Ocklahama."*

Now come Balfour, Guthrie & Company, respondents herein, and move the court that an order be made and entered herein, directing that the steamboat "Ocklahama," her tackle, apparel, furniture, engines, boilers, boats and appurtenances, now in the custody of the United States marshal for the district of Oregon, under and by virtue of an order and due and regular process herein, be sold at public sale by said marshal, and that the proceeds of such sale, after deducting the proper costs and expenses thereof, be deposited in the registry of this court, for such disposition as the court shall direct.

WILLIAMS, WOOD & LINTHICUM,
*Proctors for Balfour, Guthrie & Co., Respondents.*

824 In the District Court of the United States for the District of Oregon. In Admiralty.

The Barge "Columbia;" The Oregon Railway and Navigation Company and The Oregon Short Line and Utah Northern Railway Company, Libelants and Petitioners; Malvina Short, Administratrix of the Estate of Marshal B. Short, Deceased, *et al*, Respondents.

*Notice of Application to Set Motion for Hearing.*

To the Oregon Railway and Navigation Company and to E. McNeill, receiver thereof, and to Messrs. Cox, Cotton, Teal & Minor, proctors for said company and said receiver, and to the Oregon Short Line and Utah Northern Railway Company and to S. H. H. Clark, Oliver W. Mink, E. Ellery Anderson, John W. Doane, and Frederic R. Coudert, receivers thereof, and to Messrs.
825 Snow & McClamant, proctors for said Oregon Short Line and Utah Northern Railway Company and said receivers thereof:

Please take notice that on Tuesday, the twenty-first day of July, 1896, at the opening of court on said day, to wit, hour of eleven o'clock a. m. on said date, or as soon thereafter as counsel can be heard, we shall apply to the above-entitled court for an order in the above-entitled cause, in accordance with the motion hereto attached.

WILLIAMS, WOOD & LINTHICUM,
*Proctors for Balfour, Guthrie & Co., Respondents.*

Due service of the within motion and notice by certified copy, as prescribed by law, is hereby admitted at Portland, Oregon, July 15th, 1896.

COX, COTTON, TEAL & MINOR,
*Proctors for O. R. & N. Co. and E. McNeill, Receiver.*

COUNTY OF MULTNOMAH, }
*State of Oregon,* } ss:

I, Frank S. Bennett, being first duly sworn, on my oath say that I am an employee of Williams, Wood & Linthicum, attorneys of the city of Portland, Oregon; that on the 15th day of July, 1896, during business hours, I took to the office of Snow & McCamant, attorneys of said Portland, Oregon, a copy of the within motion and notice duly certified as such by J. C. Flanders, of said firm of Williams, Wood & Linthicum, for service, but found nobody at
826 the office of said Snow & McCamant, who would accept service thereof, and that I thereupon left same at said office in a conspicuous place therein.

FRANK S. BENNETT.

Subscribed and sworn to before me this July 15th, 1896.
[SEAL.] H. H. PARKER,
*Notary Public for Oregon.*

Due service of the within motion and notice, by certified copy, is hereby acknowledged at Portland, Oregon, this 30th day of July, 1896.

COX, COTTON, TEAL & MINOR,
*Proctors for the Oregon Short Line and Utah Northern Ry Co., One of the Petitioners.*

(Endorsed:) Filed July 16, 1896. E. D. McKee, clerk.

827 And afterwards, to wit, on the 30th day of July, 1896, there was duly filed in said court a motion of the Oregon Railway and Navigation Company for an order directing the marshal to return "Ocklahama," in words and figures as follows, to wit:

In the District Court of the United States for the District of Oregon.

The Barge "Columbia;" The Oregon Railway and Navigation Company and The Oregon Short Line and Utah Northern Railway Company, Petitioners; Malvina Short, Administratrix of the Estate of Marshal B. Short, Deceased; Sven Anderson, Administrator of the Estate of John August Peterson, Deceased; Anna C. Larsen, William Boyce, and Balfour, Guthrie & Co., Respondents.

*Motion of O. R. & N. Co. for Order Directing Marshall to Return "Ocklahama."*

Now comes The Oregon Railway and Navigation Company, one of the petitioners herein, and moves the court for an order
828 directing the marshal of this court to return the said "Ocklahama" to the possession of E. McNeill, receiver of the

Oregon Railway and Navigation Company, and respectfully shows to the court:

That some time prior hereto the marshal of this court took into his possession the steamboat "Ocklahama," and now has and holds the same; that no warrant of arrest of the said "Ocklahama" was ever lawfully issued from this court, and no libel was filed in the clerk's office against the said steamer "Ocklahama."

This petitioner further shows that this court is without jurisdiction to seize the "Ocklahama" in this proceeding, for the reason that this cause was remanded to this court for further proceedings in accordance with the opinion of the circuit court of appeals of the United States for the ninth circuit, and that this court is without power or authority in this cause to issue process against the "Ocklahama," or to cause the said "Ocklahama" to be seized.

COX, COTTON, TEAL & MINOR,
*Proctors for the Oregon Railway and Navigation Company.*

Service by copy admitted at Portland, Ore., July 29, 1896.
C. E. S. WOOD,
*Of Proctors for Respondents.*

(Endorsed:) Filed July 30, 1896. E. D. McKee, clerk.

829 And afterwards, to wit, on the 30th day of July, 1896, there was duly filed in said court a petition of E. McNeill, receiver of the Oregon Railway and Navigation Company, for order directing the marshal to return the steamboat "Ocklahama," in words and figures as follows, to wit:

In the District Court of the United States for the District of Oregon.

The Barge "Columbia;" The Oregon Railway and Navigation Company and The Oregon Short Line and Utah Northern Railway Company, Petitioners; Malvina Short, Administratrix of the Estate of Marshal B. Short, Deceased; Sven Anderson, Administrator of the Estate of John August Peterson, Deceased; Anna C. Larsen, William Boyce, and Balfour, Guthrie & Co., Respondents.

*Petition of Receiver for Order Directing Marshal to Return Steamboat "Ocklahama."*

Now comes E. McNeill, receiver of the Oregon Railway and Navigation Company, and alleges:

830 That on or about June 1, 1895, the Oregon Railway and Navigation Company, a corporation duly organized and existing under and by virtue of the laws of the State of Oregon, made, executed, and delivered to the Farmers' Loan and Trust Company, a corporation duly organized and existing under and by virtue of the laws of the State of New York, a deed of trust of all of the property of the said Oregon Railway and Navigation Company to secure an issue of bonds made, executed, and delivered by the said

Oregon Railway and Navigation Company, and negotiated and sold to various persons throughout the United States and elsewhere; that at all times since June 1, 1886, there has been outstanding and in the hands of various persons over $12,000,000 of said bonds so secured by said mortgage; that said bonds bear interest at the rate of five per cent. per annum, payable semi-annually on the first days of December and June in each year; that by the terms of the said deed of trust it is provided that the principal of said bonds should immediately become due and payable in case of any default in the payment of interest; that the said Oregon Railway and Navigation Company wholly failed to pay the interest due upon said bonds on the first day of December, 1893, and such proceedings were thereafter duly had that the principal upon said bonds became due and payable, and on or about the 25th of June, 1894, the Farmers' Loan and Trust Company, as trustee, named in said deed of trust, commenced its suit against the Oregon Railway and Navigation Company and others in the circuit court of the United States for
831 the district of Oregon, for the purpose of foreclosing the lien of said bonds so issued and outstanding and secured by the said deed of trust, and that such proceedings were had in said suit that on or about the 3d day of July, 1894, your petitioner, the said Edwin McNeill, was duly appointed receiver of the Oregon Railway and Navigation Company and of all of its property, and duly qualified as such, and entered into the possession of the property of the said Oregon Railway and Navigation Company; that among other property owned by the said Oregon Railway and Navigation Company at the time of the execution of the said deed of trust and thereby conveyed was the steamboat "Ocklahama;" that the home port of the said "Ocklahama" was the port of Portland, Oregon, and the said steamer "Ocklahama" at the time of making of said deed of trust was enrolled or registered at the office of the collector of customs for the port of Portland, Oregon, and that the said deed of trust so made as aforesaid to the said Farmers' Loan and Trust Company was recorded in the office of the said collector of customs at the port of Portland, Oregon; that some time prior hereto the marshal of this court entered upon the said steamer "Ocklahama" and took possession of the same, and has since remained in the possession of said steamer and has excluded your petitioner therefrom; that said marshal has represented that the said boat was so taken into his possession as a result of process issuing out of this court and in the above-entitled suit.

Your petitioner further represents that no libel against the
832 said steamer "Ocklahama" has been filed in the clerk's office of this court in this or in any other suit; that no warrant of arrest of the said steamer "Ocklahama" has ever been issued in this suit calling upon the owners or persons claiming the said steamer "Ocklahama" to answer any libel filed in this or in any other suit.

Wherefore, your petitioner prays that the said marshal be directed to return the said steamer "Ocklahama" to the possession of your petitioner, and that any alleged warrant of arrest undertaken to be

issued against the said steamer "Ocklahama" may be by the order of this court recalled, set aside, and held for naught, and your petitioner will ever pray.

E. McNEILL, *Receiver.*

COX, COTTON, TEAL & MINOR,
*Proctors for Petitioner.*

DISTRICT OF OREGON, } ss:
*County of Multnomah,* }

I, E. McNeill, being duly sworn, depose and say that I have read the foregoing petition and know the contents thereof, and the same is true as I verily believe.

E. McNEILL.

Subscribed and sworn to before me this 29th day of July, 1896.
[SEAL.] ROB'T R. REID, JR.,
*Notary Public in and for Oregon.*

833 Service by copy admitted, at Portland, Ore., July 29, 1896.
C. E. S. WOOD,
*Of Proctors for Respondents.*

(Endorsed:) Filed July 30, 1896. E. D. McKee, clerk.

And afterwards, to wit, on the 16th day of September, 1896, there *was* duly filed in said court exceptions of Balfour, Guthrie and Company to petition of E. McNeill, receiver, in words and figures as follows, to wit:

In the District Court of the United States for the District of Oregon.
In Admiralty.

The Barge "Columbia;" The Oregon Railway and Navigation Company and The Oregon Short Line and Utah Northern Railway Company, Libelants and Petitioners; Malvina Short, Administratrix of the Estate of Marshal B. Short, Deceased, *et al.*, Respondents.

834 *Exceptions of Balfour, Guthrie & Co. to Petition of Receiver.*

Exceptions taken to the petition heretofore filed in said cause by E. McNeill, receiver of the Oregon Railway and Navigation Company, praying that the marshal of this court be directed to return the steamer "Ocklahama" to the possession of said E. McNeill, receiver, etc.

Balfour, Guthrie & Co., respondents herein, hereby except to said petition, for that the same is immaterial, irrelevant, and impertinent, and pray that the same be denied.

WILLIAMS, WOOD & LINTHICUM,
*Proctors for Balfour, Guthrie & Co., Respondents.*

Due service of the within exceptions by certified copy, as prescribed by law, is hereby admitted at Portland, Oregon, September 16, 1896.

COX, COTTON, TEAL & MINOR,
*Proctors for Libellants and Petitioners.*

(Endorsed:) Filed September 16, 1896. E. D. McKee, clerk.

835 And afterwards, to wit, on Thursday, the 24th day of September, 1896, the same being the 70th judicial day of the regular July term of said court—present, the Honorable Charles B. Bellinger, United States district judge presiding—the following proceedings were had in said case, to wit:

In the District Court of the United States for the District of Oregon.

The Barge "Columbia;" The Oregon Railway and Navigation Company *et al.*, Libelants and Petitioners; Balfour, Guthrie & Co., Respondents. No. 3163.

*Order Denying Motion of Oregon Railway and Navigation Company and of Receiver.*

SEPTEMBER 24, 1896.

Now, at this day, this cause comes on to be heard upon the motion of E. McNeill, receiver of the Oregon Railway and Navigation Company, and of the Oregon Railway and Navigation Company, for an order directing the marshal to return the steamboat "Ocklahama" to the said receiver, and was argued by Mr. W. W. Cotton, of counsel for the libelants and petitioners, and by Mr. C. E. S. Wood, of counsel for Balfour, Guthrie and Company, respondents, on consideration whereof, it is ordered and adjudged that said motions be, and the same are hereby, denied.

836 And afterwards, to wit, on the 25th day of September, 1896, there was duly filed in said court a petition of intervention of the Oregon Railroad and Navigation Company, in words and figures as follows, to wit:

In the District Court of the United States for the District of Oregon.
In Admiralty.

The Barge "Columbia;" The Oregon Railway and Navigation Company and The Oregon Short Line and Utah Northern Railway Company, Libelants and Petitioners; Balfour, Guthrie & Co. *et al.*, Respondents.

*Petition of Intervention of Oregon Railroad and Navigation Company.*

Now comes the Oregon Railroad and Navigation Company, intervening for its interest in the steamer "Ocklahama," now in the possession of the marshal of this court, and respectfully shows unto the court:

First. That the Oregon Railway and Navigation Company, a corporation duly organized and existing under the laws of the State of Oregon, did, on or about the first day of June, 1885, make,
837 execute, and deliver to the Farmers' Loan and Trust Company, a corporation duly organized and existing under the laws of the State of New York, a certain consolidated mortgage, bearing date the said first day of June, 1885, whereby, subject to a certain prior mortgage dated July 1, 1879, made by the said Oregon Railway and Navigation Company to the said Farmers' Loan and Trust Company, the said Oregon Railway and Navigation Company did mortgage to the said Farmers' Loan and Trust Company all and singular its property, real, personal, and mixed, including the said steamer "Ocklahama," to secure a certain series of five per cent. consolidated mortgage bonds.

Second. That under and in pursuance of the provisions of said consolidated mortgage there *was* duly issued, and at the date of the decree hereinafter mentioned there were outstanding, such consolidated mortgage bonds to the amount of twelve million five hundred and eighty-three thousand ($12,583,000) dollars, which said consolidated mortgage bonds bore interest at the rate of five per cent. per annum, payable semi-annually on the first days of June and December in each year, and that the said Oregon Railway and Navigation Company did, on or about the first day of December, 1893, make default in the payment of the interest on the said consolidated mortgage bonds which became due on the said first day of December, 1893, and did thereafter, on or about the first day of June, 1894, likewise make default in the payment of the interest on the said consolidated mortgage bonds which became payable on the first day of June, 1894, and that such proceedings were thereafter duly had under and in pursuance of the terms of the said
838 consolidated mortgage that the principal of all of the bonds secured by the said consolidated mortgage became due and payable prior to the date of the commencement of the suit hereinafter mentioned.

Third. That after such default in the payment of interest, and after the principal of the said consolidated mortgage bonds became due as aforesaid, there was on or about the 25th day of June, 1894, begun in the circuit court of the United States for the district of Oregon, a suit in equity to foreclose the said consolidated mortgage, in which suit the said Farmers' Loan and Trust Company was complainant and The Oregon Railway and Navigation Company and others were defendants, and thereafter, in said suit, by proceedings duly had therein, E. McNeill was appointed receiver of all of the property of the Oregon Railway and Navigation Company, including the said steamboat "Ocklahama," and duly qualified as such receiver, and entered into the possession of the property of the said Oregon Railway and Navigation Company, including the said steamer "Ocklahama," and remained in the possession of the said steamer "Ocklahama" until said steamer was taken from the custody of the said McNeill by the marshal of this court.

Fourth. That in said suit in equity against the Oregon Railway

and Navigation Company to foreclose said mortgage, such proceedings were thereafter duly had in said court that on the 10th day of August, 1895, a decree was duly entered in said court whereby it was ordered that in default of certain payments therein mentioned

839 all of the property of the Oregon Railway and Navigation Company, including the said steamer "Ocklahama," should be sold as an entirety, and without an appraisement or right of redemption, by Richard B. Knapp, who was by said decree appointed master commissioner for such purpose, at public auction to the highest bidder therefor, and that afterwards, to wit, on the 9th day of July, 1896, at the time and place fixed in and by said decree, and in the manner required by said decree, the said Richard B. Knapp, as master commissioner, sold all of the property of the Oregon Railway and Navigation Company at public auction to A. Marcus, Charles S. Fairchild, and Charles C. Beaman, for the sum of nine million four hundred and thirty-seven thousand two hundred and fifty ($9,437,250.00) dollars; that the said Richard B. Knapp did, after such sale, and on or about the 9th day of July, 1896, duly make a report thereof to the said circuit court of the United States for the district of Oregon, which said report was duly filed in the office of the clerk of said court on the 9th day of July, 1896, and that thereafter and on the 16th day of July, 1896, an order or decree was duly made and entered by the said court confirming said sale, and directing that the said Richard B. Knapp, as master commissioner, forthwith make, execute, acknowledge for record, and deliver to the said A. Marcus, Charles S. Fairchild, and Charles C. Beaman a deed conveying and transferring all the premises and property, rights, and franchises purchased by them as aforesaid, including the said steamer "Ocklahama;" and that afterwards, to wit, on the 18th day of July, 1896, the said Richard B. Knapp duly made, executed, and delivered the said deed to the said A. Marcus, Charles S. Fairchild, and Charles C. Beaman.

840 Fifth. That afterwards, to wit, on the 17th day of August, 1896, the said A. Marcus, Charles S. Fairchild, and Charles C. Beaman duly made, executed, and delivered to The Oregon Railroad and Navigation Company, your petitioner herein, a deed conveying to your petitioner, for a valuable consideration, all of the property acquired by the said Marcus, Fairchild, and Beaman, including the said steamer "Ocklahama."

Sixth. That on the said 17th day of August, 1896, the Oregon Railway and Navigation Company, as required by said decree, duly made, executed, and delivered to your petitioner a deed conveying to your petitioner all of the property of the Oregon Railway and Navigation Company, including the said steamer "Ocklahama," and by way of further assurance did, on the 21st day of September, 1896, duly make, execute, and deliver to your petitioner a bill of sale of all of the steamers formerly owned by the Oregon Railway and Navigation Company, including the steamer "Ocklahama," duly reciting in said bill of sale the certificate of registry of the said steamer "Ocklahama," and that your petitioner is now the true and *bona fide* owner of said steamer.

Seventh. That no person has ever claimed the said steamer "Ocklahama" as owner, and the said steamer is now in the possession of the marshal of this court; that your petitioner has had no previous opportunity to appear and claim the said steamer.

Wherefore, your petitioner prays that it may be allowed to intervene for the purpose of protecting its interest in the said steamer "Ocklahama," and that it may be allowed to claim said
841 steamer as owner, and appear herein and defend as such owner, and that for the purpose of enabling your petitioner to obtain a release of the said steamer, the said steamer may be appraised in accordance with the rules and practice of this court and of the eleventh admiralty rule of the Supreme Court of the United States, and that your petitioner may be allowed, in case it may be so advised, to give a bond for the value of the said steamer as determined by the said appraisement; and that your petitioner may have such other and further relief as to the court may seem just and proper, and your petitioner will ever pray.

THE OREGON RAILROAD AND NAVIGATION COMPANY,
By W. W. COTTON, *Secretary.*

STATE OF OREGON, *County of Multnomah,* } ss:

I, W. W. Cotton, being first duly sworn, depose and say that I am the secretary of the Oregon Railroad and Navigation Company; that I have read the foregoing petition and know the facts therein stated, and the same are true as I verily believe.

W. W. COTTON.

Subscribed and sworn to before me this 25th day of September, 1896.

[SEAL.]

H. F. CONNER,
*Notary Public in and for Oregon.*

842 Service by copy admitted at ——, —— —, 189–.

C. E. S. WOOD,
*Attorney for* ——.

(Endorsed:) Filed September 25, 1896. E. D. McKee, clerk.

And afterwards, to wit, on Friday, the 25th day of September, 1896, the same being the 71st judicial day of the regular July term of said court—present, the Honorable Charles B. Bellinger, United States district judge, presiding—the following proceedings were had in said case, to wit:

In the District Court of the United States for the District of Oregon.

The Barge "Columbia." No. 3163.

*Order Allowing Oregon Railway and Navigation Company to Intervene, etc.*

SEPTEMBER 25, 1896.

The petition of the Oregon Railroad and Navigation Company, intervening for its interest in the steamer "Ocklahama," came on this day to be heard, W. W. Cotton appearing on behalf of the said petitioners and C. E. S. Wood appearing on behalf of the respondents in the above proceeding, and the court being fully advised in the premises, it is ordered that the prayer of the said petition be granted, and that the said The Oregon Railroad and Navigation Company is allowed to intervene in this proceeding, for the purpose of protecting its interest in the said steamer "Ocklahama," and is allowed to claim the said steamer as owner, and appear herein and defend as such owner.

843 It is further ordered, adjudged, and decreed that F. S. Bosworth, Theodore Wygant, and Charles T. Kamm are hereby appointed appraisers, to appraise and determine the value of the said steamer "Ocklahama" in accordance with the rules and practice of this court.

It is further ordered that the said petitioner is hereby granted five days in which to move or plead herein.

CHARLES B. BELLINGER, *Judge.*

(Endorsed:) Filed September 25, 1896. E. D. McKee, clerk.

And afterwards, to wit, on the 30th day of September, 1896, there was duly filed in said court a claim of owner of the steamboat "Ocklahama," in words and figures as follows, to wit:

*Claim of Owner of Steamboat "Ocklahama."*

DISTRICT OF OREGON, *ss:*

In the District Court of the United States for the District of Oregon.

To the Hon. Charles B. Bellinger, judge of the district court of the United States for said district:

E. McNeill, of Portland, in the district of Oregon, for and on behalf of the Oregon Railroad and Navigation Company, owner of the vessel called the "Ocklahama," her tackle, apparel, and furniture, intervening for interest in said vessel, her tackle, etc., appear- before this honorable court, and claim- said vessel, her tackle, etc.,

844 and state- that the Oregon Railroad and Navigation Company is the true and *bona fide* owner thereof. And thereupon the said claimant prays that this honorable court will be pleased to decree to it a restitution of the said vessel, her tackle, etc., and otherwise right and justice to administer in the premises.

And the said E. McNeill, being duly sworn, deposes and says that no other persons, except the said The Oregon Railroad and Navigation Company, are owners of the said vessel, her tackle, etc., or of any part thereof, and that this affiant is the president and general manager of said company.

E. McNEILL.

Subscribed and sworn to before me, this September 30, 1896.

E. D. McKEE, *Clerk*,
By G. H. MARSH,
*Deputy Clerk.*

(Endorsed:) Filed Jan. 24, 1898. E. D. McKee, clerk.

845 And afterwards, to wit, on the 30th day of September, 1896, there was duly filed in said court a stipulation of the claimant of the steamboat "Ocklahama" for costs, in words and figures as follows, to wit:

In the District Court of the United States for the District of Oregon.

In the Matter of the Limitation of Liability of the Barge "Columbia;" The Oregon Short Line and Utah Northern Railway Company and The Oregon Railway and Navigation Company, Petitioners; Balfour, Guthrie & Co. *et al.*, Respondents.

*Claimant's Stipulation for Costs.*

Whereas, in the above-entitled proceeding the steamtug "Ocklahama" was seized by the marshal of this court and taken into the possession of said marshal; and,

Whereas, a claim has been filed in the said cause by the Oregon Railroad and Navigation Company praying that the court be pleased to decree to the said The Oregon Railroad and Navigation Company a restitution of the said vessel, her tackle, etc., and the said The Oregon Railroad and Navigation Company, and J. G. Woodworth, as surety, parties hereto, hereby consenting and

846 agreeing that in case of default or contumacy on the part of the claimant or its surety, execution may issue against their goods, chattels, and lands for the sum of $200.00:

Now, therefore, it is hereby stipulated and agreed, for the benefit of whom it may concern, that the stipulators undersigned shall be, and are, bound in the sum of $200.00, conditioned that The Oregon Railroad and Navigation Company, the claimant above named, shall pay all such costs as shall be awarded against it by this court, or, in case of appeal, by the appellate court.

THE OREGON RAILROAD AND NAVIGATION COMPANY,
By E. McNEIL, *President.* [SEAL.]
J. G. WOODWORTH, *Surety.* [SEAL.]

Attest: —— ——, *Secretary.*

Taken and acknowledged before me this 30th day of September, 1896.

E. D. McKEE, *Clerk*,
By G. H. MARSH, *Deputy*.

DISTRICT OF OREGON, *ss*:

I, J. G. Woodworth, being first duly sworn, depose and say that I reside in the district of Oregon; that I am a householder in said district, and am worth the sum of $500.00 over and above my just debts and liabilities.

J. G. WOODWORTH.

847 Subscribed and sworn to before me this 30th day of September, 1896.

E. D. McKEE, *Clerk*,
By G. H. MARSH, *Deputy*.

(Endorsed:) Filed September 30, 1896. E. D. McKee, clerk.

And afterwards, to wit, on the 1st day of October, 1896, there was duly filed in said court a petition that the steamboat "Ocklahama" be returned to Oregon Railroad and Navigation Company, in words and figures as follows, to wit:

In the District Court of the United States for the District of Oregon.

The Barge "Columbia;" The Oregon Railway and Navigation Company and The Oregon Short Line and Utah Northern Railway Company, Petitioners; Malvina Short, Administratrix of the Estate of Marshal B. Short, Deceased; Sven Anderson, Administrator of the Estate of John August Peterson, Deceased; Anna C. Larsen, William Boyce, and Balfour, Guthrie & Co., Respondents.

848 *Petition for Order Directing Marshal to Return Steamboat "Ocklahama."*

Now comes The Oregon Railroad and Navigation Company, claimant and owner of the steamtug "Ocklahama," and respectfully shows to the court that the Oregon Railroad and Navigation Company is now, and at all times since the 17th day of August, 1896, has been, the owner and entitled to the possession of the steamboat "Ocklahama;" that some time prior hereto the marshal of this court took into his possession the steamboat "Ocklahama," and now has and holds the same under and by virtue of an alleged warrant issued in the above-entitled suit; that no warrant of arrrst of the said steamer "Ocklahama" was ever lawfully issued from this court, and no libel was filed in the clerk's office against the said steamer "Ocklahama." The Oregon Railroad and Navigation Company further shows that this court is without jurisdiction to arrest the "Ocklahama" in this proceeding, for the reason that this cause was remanded to this court for further proceedings in accordance with the opinion of the circuit court of appeals of the United States for the ninth circuit,

and that neither the mandate nor the said opinion required the seizure of the said "Ocklahama," and that the seizure of the said "Oklahama" was contrary to the said mandate and the said opinion, and that this court is without power or authority in this cause to issue process against the "Ocklahama" or to cause the said "Oklahama" to be seized.

The said The Oregon Railroad and Navigation Company further shows unto the court that no libel *in rem* has ever been
849 filed in this proceeding against the "Ocklahama," and that the proceeding commenced by the Oregon Railroad and Navigation Company and the Oregon Short Line and Utah Northern Railway Company to limit their liability was a suit *in personam* between the original parties thereto, and that to seize or undertake to seize the "Ocklahama" in this proceeding is an attempt to change a proceeding *in personam*, arising out of collision, into a proceeding *in rem*, and is contrary to the admiralty rules and practice of the Supreme Court of the United States.

Wherefore, the said The Oregon Railroad and Navigation Company submits that this court is without jurisdiction to seize the said "Ocklahama" or to take or keep the possession of the same, and respectfully prays that the said "Ocklahama" may be returned to the possession of the Oregon Railroad and Navigation Company, and that the said The Oregon Railroad and Navigation Company may have such other and further relief as to the court may seem meet, and have a decree for its costs in this proceeding.

COX, COTTON, TEAL & MINOR,
*Proctors for the Oregon Railroad and Navigation Company.*

COUNTY OF MULTNOMAH, } ss:
*State of Oregon,* }

I, W. W. Cotton, being first duly sworn, depose and say that I am the secretary of the Oregon Railroad and Navigation
850 Company; that I have read the foregoing petition and motion; that the facts therein stated are true as I verily believe.

W. W. COTTON.

Subscribed and sworn to before me this 1st day of October, 1896.

[SEAL.] JOSEPH N. TEAL,
*Notary Public in and for Oregon.*

Service by copy admitted at Portland, Ore., October 1, 1896.

C. E. S. WOOD,
*Of Proctors for Respondents.*

(Endorsed:) Filed October 1, 1896. E. D. McKee, clerk.

851 And afterwards, to wit, on the 12th day of October, 1896, there was duly filed in said court an oath of appraisers of the steamboat "Ocklahama," in words and figures, as follows, to wit:

59—313

In the District Court of the United States for the District of Oregon.

The Barge "Columbia" and The Steamboat "Ocklahama;" The Oregon Railway and Navigation Company *et al.*, Libelants and Petitioners; Balfour, Guthrie & Company *et al.*, Respondents. No. 3163.

*Oath of Appraisers.*

We, the undersigned, having been appointed appraisers to appraise the steamboat "Ocklahama," do solemnly swear that we will faithfully appraise the same to the best of our skill and ability.

THEODORE WYGANT.
CHAS. T. KAMM.
GEO. POPE.

Subscribed and sworn to by Theodore Wygant, before me this 12th day of October, 1896.

E. D. McKEE, *Clerk.*

852 Subscribed and sworn to by Chas. T. Kamm, before me this 16th day of October, 1896.

E. D. McKEE, *Clerk,*
By G. H. MARSH, *Deputy.*

Subscribed and sworn to by George Pope before me this 20th day of October, 1896.

E. D. McKEE, *Clerk,*
By G. H. MARSH, *Deputy.*

(Endorsed:) Filed October 12, 1896. E. D. McKee, clerk.

And afterwards, to wit, on the 22d day of October, 1896, there was duly filed in said court an appraisement of the steamboat "Ocklahama," in words and figures as follows, to wit:

*Appraisement of Steamboat "Ocklahama."*

In the District Court of the United States for the District of Oregon.

The undersigned, appointed by the Honorable Charles B. Bellinger, judge of said court, to appraise the steamer "Ocklahama," and having examined said steamer, do hereby appraise and determine the value of said steamer at eighty-six hundred ($8,600) dollars, and respectfully submit such appraisement to said court, this 22d day of October, A. D. 1896.

THEODORE WYGANT.
CHAS. T. KAMM.
GEO. POPE.

(Endorsed:) Filed October 22, 1896. E. D. McKee, clerk.

853 And afterwards, to wit, on the 6th day of November, 1896, there was duly filed in said court a stipulation for the release

of the steamboat "Ocklahama," in words and figures as follows, to wit:

In the District Court of the United States for the District of Oregon.

In the Matter of the Petition of the Oregon Railway and Navigation Company as the Owner of the Barge "Columbia" and the Oregon Short Line and Utah Northern Railway Company as Lessee Thereof.

*Stipulation for Release of Steamboat "Ocklahama."*

Whereas, the steamer "Ocklahama" has been seized in the above-entitled proceeding, and is now in the custody of the marshal, and a due appraisement has been had under the direction of the court of the said "Ocklahama," and the said "Ocklahama," her tackle, apparel, and furniture have been appraised as and at the value of eighty-six hundred dollars, and the said claimant, and H. W. Corbett and Henry Failing, its sureties, the parties hereto, hereby consenting and agreeing that in case of default or contumacy on the part of the claimant or its sureties, execution may issue against their goods, chattels, and lands for the sum of eighty-six hundred dollars:

Now, therefore, it is hereby stipulated and agreed, for the
854 benefit of whom it may concern, that the stipulators undersigned shall be, and are, bound in the sum of eighty-six hundred dollars, conditioned that the claimant above named shall abide by and pay the money awarded by the final decree rendered in the cause by this court, or in case of appeal, by the appellate court.

THE OREGON RAILROAD AND NAVIGATION CO.,
By W. W. COTTON, *General Attorney.*
HENRY FAILING.
H. W. CORBETT.

The above bond is approved.
CHARLES B. BELLINGER, *Judge.*

DISTRICT OF OREGON, *ss:*

We, Henry Failing and H. W. Corbett, being first duly sworn, do severally depose and say: That I reside in the district of Oregon; that I am a householder in said district, and am worth the sum of twenty thousand dollars over and above all my just debts and liabilities, exclusive of property exempt from execution.

HENRY FAILING.
H. W. CORBETT.

Subscribed and sworn to before me this sixth day of November, 1896.

[SEAL.] ROBERT R. REID, JR.,
*Notary Public in and for Oregon.*

(Endorsed:) Filed November 6, 1896. E. D. McKee, clerk.

855 And afterwards, to wit, on Friday, the 6th day of November, 1896, the same being the 5th judicial day of the regular November term of said court—present, the Honorable Charles B. Bellinger, United States district judge, presiding—the following proceedings were had in said case, to wit:

In the District Court of the United States for the District of Oregon.

In the Matter of the Petition of the Oregon Railway and Navigation Company as the Owner of the Barge "Columbia" and the Oregon Short Line and Utah Northern Railway Company as Lessee Thereof. No. 3163.

*Order Directing Marshal to Release Steamboat "Ocklahama."*

It appearing to the court that the steamboat "Ocklahama" has been duly appraised at the sum of eighty-six hundred dollars, and that the Oregon Railroad and Navigation Company has duly given a stipulation with good and sufficient sureties in the form required by law, it is—

Ordered that the marshal be, and he is hereby, directed to release the said vessel, and return the same to the possession of the claimant, The Oregon Railroad and Navigation Company.

November 6, 1896.

CHARLES B. BELLINGER, *Judge.*

(Endorsed:) Filed November 6, 1896. E. D. McKee, clerk.

856 And afterwards, to wit, on the 6th day of November, 1896, there was duly filed in said court the answer of the Oregon Railroad and Navigation Company to the answer of Balfour, Guthrie & Co., in words and figures as follows, to wit:

In the District Court of the United States for the District of Oregon.

In the Matter of the Petition of the Oregon Railway and Navigation Company as the Owner of the Barge "Columbia" and the Oregon Short Line and Utah Northern Railway Company as Lessee Thereof.

*Answer of Oregon Railroad and Navigation Company.*

Now comes The Oregon Railroad and Navigation Company, claimant of the steamboat "Ocklahama," and for its answer to the answer of Robert Balfour, Stephen Williamson, Alexander Guthrie, Robert Brodie Forman, R. Bruce, and Walter J. Burns to the libel and petition of the Oregon Railway and Navigation Company and the Oregon Short Line and Utah Northern Railway Company, alleges as follows:

First. That the allegations and denials in article 3 of said answer are wholly untrue, and the said The Oregon Railroad and Navigation Company alleges the facts to be as follows, to wit:

857 1. That the Oregon Railway and Navigation Company was at all the times hereinafter alleged a corporation duly created and organized by and under the laws of the State of Oregon, and was during the month of October, 1892, the owner of a certain barge or lighter known as the "Columbia;" that the Oregon Short Line and Utah Northern Railway Company was during the month of October, 1892, a corporation, duly organized and existing under and by virtue of an act of Congress of the United States entitled, "An act creating the Oregon Short Line Railway Company, a corporation in the Territories of Utah, Idaho, and Wyoming, and for other purposes," approved August 2, 1892, and was during the month of October, 1892, engaged in the business of owning and operating steamboats and other vessels, and in owning and operating lighters and barges between Portland in the State of Oregon and Astoria in said State, and elsewhere, and was during said month of October, 1892, the lessee from the Oregon Railway and Navigation Company of the said barge "Columbia," and was during said month of October operating the said barge "Columbia" under the terms and provisions of said lease, and had the sole and exclusive possession, charge, and control and management of the said barge "Columbia."

2. That on or about the 19th day of October, 1892, Robert Balfour, Stephen Williamson, Alexander Guthrie, Robert Brodie Forman, R. Bruce, and Walter J. Burns, were partners, doing business in the city of Portland and elsewhere under the firm name and style of Balfour, Guthrie & Co., and as such firm, on the said 19th day of October, 1892, loaded upon the barge "Columbia" a
858 cargo of wheat to be transported by said barge from Portland, Oregon, to Astoria, Oregon; that the said barge was under the charge of a captain, who had no connection with any other boat or vessel other than the said "Columbia," and the captain of the said barge, for and on behalf of the said "Columbia," executed and delivered to the said Balfour, Guthrie & Co. a shipping receipt or bill of lading for all the wheat carried upon said barge, to wit, eight thousand eight hundred and ninety-eight sacks, and the said shipping receipt contained the following provision, to wit:

"In consideration of the reduced rate at which the articles covered by this receipt are carried, it is agreed by the undersigned, for and on behalf of the owner of the property, that the Oregon Short Line and Utah Northern Railway Company shall not be responsible for any injury or damage to the property described in this receipt not caused by the actual negligence of the said company or its agents."

That the said agreement contained in the said receipt was signed by the said Balfour, Guthrie & Co., the owners of the said wheat, and the said wheat was carried under the terms and provisions of the said shipping receipt and not otherwise.

3. That the said barge "Columbia" was on the said 19th day of October, 1892, taken in tow by some boat or vessel other than the "Ocklahama," and was towed from the dock at which she had been loaded to a point or place in the city of Portland known as the bone

yard, and there remained from the 19th day of October, 1892, until the afternoon of the 21st day of October, 1892; that on the
859 afternoon of the 21st day of October, 1892, the steamboat "Ocklahama" took said barge "Columbia" in tow, for the purpose of towing the said barge "Columbia" from the bone yard in Portland to the dock of the Oregon Railway and Navigation Company, then operated by the Oregon Short Line and Utah Northern Railway Company at Astoria, Oregon, at which said dock the said "Ocklahama" was to leave the said barge, and was not expected or intended to further tow the said barge; that no shipping receipt was ever issued on behalf of the said "Ocklahama," and no contract was made with the said "Ocklahama" by the said Balfour, Guthrie & Co. for the towage of the said barge; that on arrival of the said "Ocklahama" with the said barge at the dock at Astoria, Oregon, the said "Ocklahama" was under orders to return immediately to Portland, leaving the said barge alongside the said dock; that all went well with the said barge and her said cargo until the said barge, on the night of the 21st of October, 1892, reached Astoria, Oregon; that lying in front of the said dock at which the said barge "Columbia" was to tie up, and floating nearly level with the water, was a float or pontoon, which consisted of twelve-inch by twelve-inch timbers securely fastened together, said pontoon being 60 feet long, one foot thick, and four feet wide, and being fastened in front of the said dock for the purpose of preventing ships from chafing against the timbers of the said dock; that the said pontoon had no fixed location along the said dock, and was from time to time moved from place to place in front of the said dock; that the said barge "Columbia" had a sharp bow, and commencing at the said bow the
860 deck of the said barge extended out over the hull for a distance of several feet, so as to make a guard along the entire side of the said barge, and in making landings such guards protected the said hull from striking against the wharf or dock at which said landings were made; that the darkness of the night rendered it impossible for the pilot and captain in charge of the "Ocklahama" to see the pontoon, and in attempting to make a landing at said dock the said barge ran against the said pontoon with her bow, instead of striking against the said dock with the guard along the side of the said barge; that the stem or forefoot of the said barge struck the said pontoon with sufficient force to break the said stem or fore*boot*, and thereby the timbers of the said barge were started so as to cause a leak; that the said leak was not considered serious or dangerous by those in charge of the said barge, and was not serious or dangerous; that the persons in charge of the barge deemed it advisable to remove the said barge into more shallow water, and thereupon the said barge was taken behind the said dock and placed alongside the rear portion of said dock, where she rested on the bottom of the Columbia river, which was there composed of soft mud, and was listed against the said dock in a safe position; that all of the cargo upon the said barge was loaded upon her deck

and was not injured in any manner whatsoever by reason of the said leak in her hold; that after the said barge had rested against the dock for about an hour and a half the master of the said barge negligently caused the cargo on the deck of said barge to be shifted until said barge was on an even keel and was no longer rest-

861 ing against said dock; that at the said time, and for some time prior thereto, the tide in the Columbia river was ebbing; that when the said barge came to an even keel she remained in that position for a short time when, the tide having ebbed and she having no lateral support, the said barge keeled over away from the said dock, striking her bilge on the bottom of the river with great force and violence and causing the cargo to shift and carry away the deck-house, and a large portion of said cargo slid into the river, and the hull of said barge was broken down by the shock; that the position in which the said barge was placed against the side of the dock was a proper and safe position and from which the cargo of the said barge might easily have been removed to the said dock; that the collapse of the said barge "Columbia" was due to the unusual and severe strain to which the timbers of the said barge were subjected in the unnatural position in which she was placed when thrown upon her side; that as a result of the overturning of the said barge and the collapse thereof, and not otherwise, the wheat owned by the said Balfour, Guthrie & Co. was damaged; that the said steamer "Ocklahama" did not in any way cause the said injury; that the same occurred solely by reason of the negligence of the captain of the said barge, as aforesaid; that the injury to the said wheat was caused solely by a peril over which the said "Ocklahama" and her officers and crew had no control, and which injury could not have been prevented by the exercise of any care on the part of the said "Ocklahama," her officers and crew.

Second. The Oregon Railroad and Navigation Company

862 denies that it has any knowledge or information sufficient to form a belief as to the extent of the damage, if any, suffered by the said wheat, or as to the value of the said wheat or any part thereof.

Third. That the said barge "Columbia" was in all respects sound, staunch, and seaworthy, and was properly manned and equipped for the voyage in which she was engaged, and was under the command of proper and suitable officers.

Fourth. That the said "Ocklahama" at the times hereinbefore mentioned was in all respects sound, staunch, and seaworthy, and was properly manned and equipped, and provided for the voyage in which she was engaged, and was under the charge and management of proper and suitable officers.

Fifth. That the said The Oregon Railroad and Navigation Company is now the owner of the said "Ocklahama" and entitled to the possession of the said steamer.

Wherefore, the Oregon Railroad and Navigation Company prays that the said "Ocklahama" may be restored to the possession of the said The Oregon Railroad and Navigation Company, and the

said The Oregon Railroad and Navigation Company may have its costs and disbursements.

COX, COTTON, TEAL & MINOR,
*Proctors for Claimant.*

STATE OF OREGON,
*Multnomah County,* } ss:

I, J. M. Long, on oath, being first duly sworn, depose and
863 say that I have read the foregoing answer of the said The Oregon Railroad and Navigation Company to the answer of Robert Balfour *et al.*, and that the same is true as I verily believe, and that I have personal knowledge of each and all of the facts set out in said answer, and am thereby able to verify this answer; that there is not now within said county and State any officer of the said company, and having personal knowledge of all the facts, I have verified this answer as employee.

J. M. LONG.

Subscribed and sworn to before me this 5th day of November, 1896.

[SEAL.]

H. F. CONNER,
*Notary Public in and for Oregon.*

Service by copy admitted at Portland, Oregon, Nov. 5, 1896.
WILLIAMS, WOOD & LINTHICUM,
*Attorney for* ——.

(Endorsed:) Filed November 6, 1896. E. D. McKee, clerk.

864 And afterwards, to wit, on Tuesday, the 20th day of July, 1897, the same being the 14th judicial day of the regular July term of said court—present, the Honorable Charles B. Bellinger, United States district judge, presiding—the following proceedings were had in said case, to wit:

In the District Court of the United States for the District of Oregon.

The Barge "Columbia;" The Oregon Railway and Navigation Company *et al.*, Libelants and Petitioners; Balfour, Guthrie & Company, Malvina Short, Anna C. Larsen, and Sven Anderson, Respondents. No. 3163.

*Order Allowing Balfour, Guthrie & Co. to File Exceptions to Answer of Oregon Railroad and Navigation Company.*

JULY 20, 1897.

Now, at this day, come the libelants and petitioners in the above-entitled cause, by Mr. W. W. Cotton, of counsel, and the respondents, Balfour, Guthrie and Company, by Mr. C. E. S. Wood and Mr. J. C. Flanders, of counsel, and the respondents Anna C. Larsen, Sven Anderson, and Malvina Short, by Mr. E. B. Watson, of counsel; whereupon, on motion of the said respondents, Balfour, Guthrie and

Company, it is ordered that said respondents be, and they
865 are hereby, allowed to file exception to the answer of the Oregon Railroad and Navigation Company heretofore filed herein. Thereupon, this cause comes on to be heard upon said exceptions, and the court having heard the arguments of counsel, will advise thereof. And thereupon, on motion of The Oregon Railroad and Navigation Company, claimant of the steamboat "Ocklahama," by Mr. W. W. Cotton, of counsel, it is ordered that said claimant be, and it is hereby, allowed ten days from this date in which to file its answers to the answers of the respondents Anna C. Larson, Sven Anderson, and Malvina Short.

And afterwards, to wit, on the 20th day of July, 1896, there was duly filed in said court exceptions of Balfour, Guthrie & Co. to answer of the Oregon Railroad and Navigation Company, in words and figures as follows, to wit:

In the District Court of the United States for the District of Oregon.
In Admiralty.

The Barge "Columbia;" in the Matter of the Petition of the Oregon Railway and Navigation Company and the Oregon Short Line and Utah Northern Railway Company for Limitation of Liability.

*Exceptions of Balfour, Guthrie & Co. to Answer of Oregon Railroad and Navigation Company.*

Now come Balfour, Guthrie & Company, respondents herein,
866 and except to the answer of the Oregon Railroad and Navigation Company, heretofore filed herein, upon the following grounds:

First. That said answer is irrelevant and impertinent.

Second. That the matters and things set up in said answer are *res judicata*.

WILLIAMS, WOOD & LINTHICUM,
*Proctors for Balfour, Guthrie & Co.*

Due service of the within exceptions by certified copy, as prescribed by law, is hereby admitted at Portland, Oregon, July 20, 1897.

COX, COTTON, TEAL & MINOR,
*Proctors for* ——.

(Endorsed:) Filed July 20, 1897. E. D. McKee, clerk.

And afterwards, to wit, on the 20th day of July, 1897, there was duly filed in said court a motion of Balfour, Guthrie & Co. for findings of fact upon the evidence in accordance with mandate, in words and figures as follows, to wit:

In the District Court of the United States for the District of Oregon.
In Admiralty.

The Barge "Columbia;" in the Matter of the Petition of the Oregon Railway and Navigation Company and the Oregon Short Line and Utah Northern Railway Company for Limitation of Liability.

867 *Motion of Balfour, Guthrie & Co. for Findings of Fact.*

Now come Balfour, Guthrie & Company, respondents herein, and move the court for findings of fact upon the evidence already adduced in this cause, in accordance with the opinion and mandate of the United States circuit court of appeals for the ninth circuit in this cause rendered.

WILLIAMS, WOOD & LINTHICUM,
*Proctors for Balfour, Guthrie & Co.*

Due service of the within exceptions by certified copy, as prescribed by law, is hereby admitted at Portland, Oregon, July 20, 1897.

COX, COTTON, TEAL & MINOR,
*Proctors for* ——.

(Endorsed:) Filed July 20, 1897. E. D. McKee, clerk.

868 And afterwards, to wit, on Monday, the 26th day of July, 1897, the same being the 19th judicial day of the regular July term of said court—present, the Honorable Charles B. Bellinger, United States district judge, presiding—the following proceedings were had in said case, to wit:

In the District Court of the United States for the District of Oregon.

The Barge "Columbia;" The Oregon Railway and Navigation Company *et al.*, Libellants and Petitioners; Balfour, Guthrie & Company *et al.*, Respondents; The Oregon Railroad and Navigation Company, Claimant of the "Ocklahama." No. 3163.

*Order Sustaining Exceptions of Balfour, Guthrie & Co., etc.*

JULY 26, 1897.

This cause was heard upon the exceptions of the respondents, Balfour, Guthrie and Company, to the answer of The Oregon Railroad and Navigation Company, claimant, heretofore filed herein, and was argued by Mr. W. W. Cotton, of counsel for said company, and by Mr. C. E. S. Wood and Mr. J. C. Flanders, of counsel
869 for said respondents; on consideration whereof, it is ordered and adjudged that said exceptions be, and the same are hereby, sustained. And on motion of said claimant, it is ordered that it be, and is hereby, allowed three days in which to file an

amended answer to the answer of said respondent, Balfour, Guthrie and Company.

And afterwards, to wit, on the 28th day of July, 1897, there was duly filed in said court an answer of Oregon Railroad and Navigation Company to answer of Balfour, Guthrie & Co., in words and figures as follows, to wit:

In the District Court of the United States for the District of Oregon.

In the Matter of the Petition of the Oregon Railway and Navigation Company as the Owner of the Barge "Columbia" and the Oregon Short Line and Utah Northern Railway Company as Lessee Thereof.

*Answer of Oregon Railroad and Navigation Company to Answer of Balfour, Guthrie & Co.*

Now comes the Oregon Railroad and Navigation Company, claimant of the steamboat "Ocklahama," and for its answer to the answer of Robert Balfour, Stephen Williamson, Alexander Guthrie, Robert Brodie Forman, R. Bruce, and Walter J. Burns to the libel and petition of the Oregon Railway and Navigation Com-
870 pany and the Oregon Short Line and Utah Northern Railway Company, alleges as follows:

First. That the Oregon Railway and Navigation Company, a corporation duly organized and existing under the laws of the State of Oregon, did, on or about the first day of June, 1885, make, execute, and deliver to the Farmers' Loan and Trust Company, a corporation duly organized and existing under the laws of the State of New York, a certain consolidated mortgage, bearing date the said first day of June, 1885, whereby, subject to a certain prior mortgage dated July 1, 1879, made by the said Oregon Railway and Navigation Company to the said Farmers' Loan and Trust Company, the said Oregon Railway and Navigation Company did mortgage to the said Farmers' Loan and Trust Company all and singular its property, real, personal, and mixed, including the said steamer "Ocklahama," to secure a certain series of five per cent. consolidated mortgage bonds. That said mortgage during the year 1885 was duly recorded according to law in the office of the collector of customs of the port of Portland, the port of registry of the said steamboat "Ocklahama," and all persons thereafter dealing with the said steamboat had due notice of said mortgage and of the interest of the said Farmers' Loan and Trust Company in and to the said boat as trustee under the said mortgage.

Second. That under and in pursuance of the provisions of said consolidated mortgage there were duly issued, and at the date of the decree hereinafter mentioned there were outstanding, such consolidated mortgage bonds to the amount of twelve million
871 five hundred and eighty-three thousand ($12,583,000) dollars, which said consolidated mortgage bonds bore interest at the rate of five per cent. per annum, payable semi-annually on the first

days of June and December in each year, and that the said Oregon Railway and Navigation Company did, on or about the first day of December, 1893, make default in the payment of the interest on the said consolidated mortgage bonds, which became due on the said first day of December, 1893, and did thereafter, on or about the first day of June, 1894, likewise make default in the payment of the interest on the said consolidated mortgage bonds which became payable on the first day of June, 1894, and that such proceedings were thereafter duly had under and in pursuance of the terms of the said consolidated mortgage that the principal of all of the bonds secured by the said consolidated mortgage became due and payable prior to the date of the commencement of the suit hereinafter mentioned.

Third. That after such default in the payment of interest, and after the principal of the said consolidated mortgage bonds became due as aforesaid, there was, on or about the 25th day of June, 1894, begun in the circuit court of the United States for the district of Oregon a suit in equity to foreclose the said consolidated mortgage, in which suit the said Farmers' Loan and Trust Company was complainant and The Oregon Railway and Navigation Company and others were defendants, and thereafter in said suit, by proceedings duly had therein, E. McNeill was appointed receiver of all of the property of the Oregon Railway and Navigation Company, including the said steamboat "Ocklahama," and duly quali-
872 fied as such receiver, and entered into the possession of the property of the said Oregon Railway and Navigation Company, including the said steamer "Ocklahama," and remained in the possession of the said steamer "Ocklahama" until said steamer was taken from the custody of the said McNeill by the marshal of this court.

Fourth. That in said suit in equity against the Oregon Railway and Navigation Company to foreclose said mortgage, such proceedings were thereafter duly had in said court that on the 10th day of August, 1895, a decree was duly entered in said court, whereby it was ordered that in default of certain payments therein mentioned all of the property of the Oregon Railway and Navigation Company, including the said steamer "Ocklahama," should be sold as an entirety, and without an appraisement or right of redemption, by Richard B. Knapp, who was by said decree appointed master commissioner for such purpose, at public auction to the highest bidder therefor, and that afterwards, to wit, on the 9th day of July, 1896, at the time and place fixed in and by said decree, and in the manner required by said decree, the said Richard B. Knapp, as master commissioner, sold all of the property of the Oregon Railway and Navigation Company at public auction to A. Marcus, Charles S. Fairchild, and Charles C. Beaman, for the sum of nine million four hundred and thirty-seven thousand two hundred and fifty ($9,437,250.00) dollars; that the said Richard B. Knapp did, after such sale, and on or about the 9th day of July, 1896, duly make a report thereof to the said circuit court of the United States

for the district of Oregon, which said report was duly filed
873 in the office of the clerk of said court on the 9th day of July, 1896, and that thereafter and on the 16th day of July, 1896, an order or decree was duly made and entered by the said court confirming said sale, and directing that the said Richard B. Knapp, as master commissioner, forthwith make, execute, acknowledge for record, and deliver to the said A. Marcus, Charles S. Fairchild, and Charles C. Beaman, a deed conveying and transferring all the premises and property, rights, and franchises purchased by them as aforesaid, including the said steamer "Ocklahama;" and that afterwards, to wit, on the 18th day of July, 1896, the said Richard B. Knapp duly made, executed, and delivered the said deed to the said A. Marcus, Charles S. Fairchild, and Charles C. Beaman.

Fifth. That afterwards, to wit, on the 17th day of August, 1896, the said A. Marcus, Charles S. Fairchild, and Charles C. Beaman duly made, executed, and delivered to The Oregon Railroad and Navigation Company, your petitioner herein, a deed conveying to your petitioner, for a valuable consideration, all of the property acquired by the said Marcus, Fairchild, and Beaman, including the said steamer "Ocklahama."

Sixth. That on the said 17th day of August, 1896, the Oregon Railway and Navigation Company, as required by said decree, duly made, executed, and delivered to your petitioner a deed conveying to your petitioner all of the property of the Oregon Railway and Navigation Company, including the said steamer "Ocklahama," and by way of further assurance did, on the 21st day of September,
1896, duly make, execute, and deliver to your petitioner a
874 bill of sale of all of the steamers formerly owned by the Oregon Railway and Navigation Company, including the steamer "Ocklahama," duly reciting in said bill of sale the certificate of registry of the said steamer "Ocklahama," and that your petitioner is now the true and *bona fide* owner of said steamer.

Seventh. That the allegations and denials in article 3 of the said answer are wholly untrue, and that the facts are as follows, to wit:

1. That the Oregon Railway and Navigation Company was at all the times hereinafter alleged a corporation duly created and organized by and under the laws of the State of Oregon, and was during the month of October, 1892, the owner of a certain barge or lighter known as the "Columbia;" that the Oregon Short Line and Utah Northern Railway Company was, during the month of October, 1892, a corporation duly organized and existing under and by virtue of an act of Congress of the United States, entitled "An act creating the Oregon Short Line Railway Company, a corporation in the Territories of Utah, Idaho, and Wyoming, and for other purposes," approved August 2, 1892, and was during the month of October, 1892, engaged in the business of owning and operating steamboats and other vessels, and in owning and operating lighters and barges between Portland in the State of Oregon, and Astoria in said State, and elsewhere, and was during said month of October, 1892, the lessee from the Oregon Railway and Navigation Company of the

said barge "Columbia," and was during said month of October operating the said barge "Columbia" under the terms and
875 provisions of said lease, and had the sole and exclusive possession, charge, and control and management of the said barge "Columbia."

2. That on or about the 19th day of October, 1892, Robert Balfour, Stephen Williamson, Alexander Guthrie, Robert Brodie Forman, and Walter J. Burns were partners, doing business in the city of Portland and elsewhere, under the firm name and style of Balfour, Guthrie & Co., and as such firm, on the said 19th day of October, 1892, loaded upon the barge "Columbia" a cargo of wheat to be transported by said barge from Portland, Oregon, to Astoria, Oregon; and that the said barge was under the charge of a captain, who had no connection with any other boat or vessel other than the said "Columbia," and the captain of the said barge, for and on behalf of the said "Columbia," executed and delivered to the said Balfour, Guthrie & Co. a shipping receipt or bill of lading for all the wheat carried upon said barge, to wit, eight thousand eight hundred and ninety eight sacks, and the said shipping receipt contained the following provision, to wit:

"In consideration of the reduced rate at which the articles covered by this receipt are carried, it is agreed by the undersigned, for and on behalf of the owner of the property, that the Oregon Short Line and Utah Northern Railway Company shall not be responsible for any injury or damage to the property described in this receipt not caused by the actual negligence of the said company or its agents."

That the said agreement contained in the said receipt was
876 signed by the said Balfour, Guthrie & Co., the owners of the said wheat, and the said wheat was carried under the terms and provisions of the said shipping receipt, and not otherwise.

3. That the said barge "Columbia" was on the said 19th day of October, 1892, taken in tow by some boat or vessel other than the "Ocklahama," and was towed from the dock at which she had been loaded to a point or place in the city of Portland known as the bone yard, and there remained from the 19th day of October, 1892, until the afternoon of the 21st day of October, 1892; that on the afternoon of the 21st day of October, 1892, the steamboat "Ocklahama" took said barge "Columbia" in tow, for the purpose of towing the said barge "Columbia" from the bone yard in Portland to the dock of the Oregon Railway and Navigation Company, then operated by the Oregon Short Line and Utah Northern Railway Company of Astoria, Oregon, at which said dock the said "Ocklahama" was to leave the said barge, and was not expected or intended to further tow the said barge; that no shipping receipt was ever issued on behalf of the said "Ocklahama" and no contract was made with the said "Ocklahama" by the said Balfour, Guthrie & Co. for the towage of the said barge; that on arrival of the said "Ocklahama" with the said barge at the dock in Astoria, Oregon, the said "Ocklahama" was under orders to return immediately to Portland, leaving the said barge alongside the said dock; that all went well with the said barge and her said cargo until the said

barge, on the night of the 21st of October, 1892, reached Astoria, Oregon; that lying in front of the said dock at which the said barge "Columbia" was to tie up, and floating nearly level
877 with the water, was a float or pontoon, which consisted of twelve-inch by twelve-inch timbers securely fastened together, said pontoon being 60 feet long, one foot thick, and four feet wide, and being fastened in front of the said dock for the purpose of preventing ships from chafing against the timbers of the said dock; that the said pontoon had no fixed location along the said dock, and was from time to time moved from place to place in front of the said dock; that the said barge "Columbia" had a sharp bow, and commencing at the said bow the deck of the said barge extended out over the hull for a distance of several feet, so as to make a guard along the entire side of the said barge, and in making landings such guards protected the said hull from striking against the wharf or dock at which said landings were made; that the darkness of the night rendered it impossible for the pilot and captain in charge of the "Ocklahama" to see the pontoon, and in attempting to make a landing at said dock, the said barge ran against the said pontoon with her bow, instead of striking against the said dock with the guard along the side of the said barge; that the stem or forefoot of the said barge struck the said pontoon with sufficient force to break the said stem or forefoot, and thereby the timbers of the said barge were started so as to cause a leak; that the said leak was not considered serious or dangerous by those in charge of the said barge, and was not serious or dangerous; that the persons in charge of the barge deemed it advisable to remove the said barge into more shallow water, and thereupon the said barge was taken behind the said dock and placed alongside the rear portion of said dock, where she rested on the bottom of the Columbia river, which was
878 there composed of soft mud, and was listed against the said dock in a safe position; that all of the cargo upon the said barge was loaded upon her deck, and was not injured in any manner whatsoever by reason of the said leak in her hold; that after the said barge had rested against the dock for about an hour and a half, the master of the said barge negligently caused the cargo on the deck of said barge to be shifted, until said barge was on an even keel and was no longer resting against said deck; that the said time, and for some time prior thereto, the tide in the Columbia river was ebbing; that when the said barge came to an even keel she remained in that position for a short time, when, the tide having ebbed and she having no lateral support, the said barge keeled over away from the said dock, striking her bilge on the bottom of said river with great force and violence, and causing the cargo to shift and carry away the deck-house, and a large portion of said cargo slid into the river, and the hull of said barge was broken down by the shock; that the position in which the said barge was placed against the side of the dock was a proper and safe position, and from which the cargo of the said barge might easily have been removed to the said dock; that the collapse of the said barge "Columbia" was due

to the unusual and severe strain to which the timbers of the said barge were subjected in the unnatural position in which she was placed when thrown upon her side; that as a result of the overturning of the said barge and the collapse thereof, and not otherwise, the wheat owned by the said Balfour, Guthrie & Co. was damaged;

879 that the said steamer "Ocklahama" did not in any way cause the said injury; that the same occurred solely by reason of the negligence of the captain of the said barge as aforesaid; that the injury to the said wheat was caused solely by a peril over which the said "Ocklahama" and her officers and crew had no control, and which injury could not have been prevented by the exercise of any care on the part of the said "Ocklahama," her officers and crew.

4. That it was not intended that the said "Ocklahama" should tow the said barge "Columbia" any further than the said dock at Astoria, Oregon, and that the said barge was to be delivered to the ship "Westgate" by some other tugboat, and that no contract was ever made with the said steamer "Ocklahama," or her owners thereof, for the towage of the said barge "Columbia" to the said "Westgate," and that the only contract existing for the towage of the said barge is that resulting by operation of law from the facts hereinbefore stated.

Eighth. The Oregon Railroad and Navigation Company denies that it has any knowledge or information sufficient to form a belief as to the extent of the damage, if any, suffered by the said wheat, or as to the value of the said wheat or any part thereof.

Ninth. That the said barge "Columbia" was in all respects sound, staunch, and seaworthy, and was properly manned and equipped for the voyage in which she was engaged, and was under the command of proper and suitable officers.

Tenth. That the said "Ocklahama," at the times herein-

880 before mentioned, was in all respects sound, staunch, and seaworthy, and was properly manned and equipped and provided for the voyage in which she was engaged, and was under the charge and management of proper and suitable officers.

Eleventh. That the said The Oregon Railroad and Navigation Company is now the owner of the said steamer "Ocklahama," and entitled to the possession of the said steamer.

Twelfth. The Oregon Railroad and Navigation Company further alleges that no libel has ever been filed in this court in this cause by the said Robert Balfour and others against the said "Ocklahama" or her owners or charterers.

Wherefore, the Oregon Railroad and Navigation Company prays that the right, title, and interest of the said The Oregon Railroad and Navigation Company in and to the said "Ocklahama" may be declared to be superior and prior to that of the said Robert Balfour and others, and that the said "Ocklahama" may be restored to the possession of the said The Oregon Railroad and Navigation Company, and that the said The Oregon Railroad and Navigation Company may have such other and further relief as may be just and

equitable, and that the said The Oregon Railroad and Navigation Company may have its costs and disbursements.

COX, COTTON, TEAL & MINOR,
*Proctors for the said The Oregon Railroad and Navigation Company.*

881 STATE OF OREGON, } ss:
*County of Multnomah,* }

I, W. W. Cotton, on oath, being first duly sworn, depose and say that I am the secretary of the Oregon Railroad and Navigation Company; that I have read the foregoing answer of the said The Oregon Railroad and Navigation Company to the answer of Robert Balfour and others, and the same is true as I verily believe.

W. W. COTTON.

Subscribed and sworn to before me this 29th day of July, 1897.

[SEAL.] W. C. BRISTOL,
*Notary Public in and for Oregon.*

Service by copy admitted at Portland, Ore., July 29, 1897.

WILLIAMS, WOOD & LINTHICUM,
*Attorneys for Balfour, Guthrie & Co.*

(Endorsed:) Filed July 28, 1897. E. D. McKee, clerk.

882 And afterwards, to wit, on the 28th day of July, 1897, there was duly filed in said court answer of the Oregon Railroad and Navigation Company to answer of Malvina Short, in words and figures as follows, to wit:

In the District Court of the United States for the District of Oregon.

In the Matter of the Petition of the Oregon Railway and Navigation Company as the Owner of the Barge "Columbia" and the Oregon Short Line and Utah Northern Railway Company as Lessee Thereof.

*Answer of Oregon Railroad and Navigation Company to Answer of Malvina Short.*

Now comes The Oregon Railroad and Navigation Company, claimant of the steamboat "Ocklahama," and for its answer to the answer of Malvina Short, administratrix of the estate of Marshal B. Short, deceased, alleges as follows:

First. That the Oregon Railway and Navigation Company, a corporation duly organized and existing under the laws of the State of Oregon, did, on or about the first day of June, 1885, make, execute, and deliver to the Farmers' Loan and Trust Company, a corporation duly organized and existing under the laws of the State of New York, a certain consolidated mortgage, bearing date the said first day of June, 1885, whereby, subject to a certain prior
883 mortgage dated July 1, 1879, made by the said Oregon Railway and Navigation Company to the said Farmers' Loan

and Trust Company, the said Oregon Railway and Navigation Company did mortgage to the said Farmers' Loan and Trust Company all and singular its property, real, personal, and mixed, including the said steamer "Ocklahama," to secure a certain series of five per cent. consolidated mortgage bonds. That said mortgage during the year 1885 was duly recorded according to law in the office of the collector of customs of the port of Portland, the port of registry of the said steamboat "Ocklahama," and all persons thereafter dealing with the said steamboat had due notice of said mortgage and of the interest of the said Farmers' Loan and Trust Company in and to the said boat as trustee under the said mortgage.

Second. That under and in pursuance of the provisions of said consolidated mortgage there were duly issued, and at the date of the decree hereinafter mentioned there were outstanding, such consolidated mortgage bonds to the amount of twelve million five hundred and eighty-three thousand ($12,583,000) dollars, which said consolidated mortgage bonds bore interest at the rate of five per cent. per annum, payable semi-annually on the first days of June and December in each year, and that the said Oregon Railway and Navigation Company did, on or about the first day of December, 1893, make default in the payment of the interest on the said consolidated mortgage bonds which became due on the said first day of December, 1893, and did thereafter, on or about the first day of June, 1894, likewise make default in the payment of the interest on the said consolidated mortgage bonds which became payable
884 on the first day of June, 1894, and that such proceedings were thereafter duly had under and in pursuance of the terms of the said consolidated mortgage that the principal of all of the bonds secured by the said consolidated mortgage became due and payable prior to the date of the commencement of the suit hereinafter mentioned.

Third. That after such default in the payment of interest, and after the principal of the said consolidated mortgage bonds became due as aforesaid, there was, on or about the 25th day of June, 1894, begun in the circuit court of the United States for the district of Oregon a suit in equity to foreclose the said consolidated mortgage, in which suit the said Farmers' Loan and Trust Company was complainant and The Oregon Railway and Navigation Company and others were defendants, and thereafter in said suit, by proceedings duly had therein, E. McNeill was appointed receiver of all of the property of the Oregon Railway and Navigation Company, including the said steamboat "Ocklahama," and duly qualified as such receiver, and entered into the possession of the property of the said Oregon Railway and Navigation Company, including the said steamer "Ocklahama," and remained in the possession of the said steamer "Ocklahama" until said steamer was taken from the custody of the said McNeill by the marshal of this court.

Fourth. That in said suit in equity against the Oregon Railway and Navigation Company to foreclose said mortgage, such proceedings were thereafter duly had in said court that on the 10th day of

August, 1895, a decree was duly entered in said court whereby
885 it was ordered that in default of certain payments therein mentioned all of the property of the Oregon Railway and Navigation Company, including the said steamer "Ocklahama," should be sold as an entirety, and without an appraisement or right of redemption, by Richard B. Knapp, who was by said decree appointed master commissioner for such purpose, at public auction to the highest bidder therefor, and that afterwards, to wit, on the 9th day of July, 1896, at the time and place fixed in and by said decree, and in the manner required by said decree, the said Richard B. Knapp, as master commissioner, sold all of the property of the Oregon Railway and Navigation Company at public auction to A. Marcus, Charles S. Fairchild, and Charles C. Beaman, for the sum of nine million four hundred and thirty-seven thousand two hundred and fifty ($9,437,250.00) dollars; that the said Richard B. Knapp did, after such sale, and on or about the 9th day of July, 1896, duly make a report thereof to the said circuit court of the United States for the district of Oregon, which said report was duly filed in the office of the clerk of said court on the 9th day of July, 1896, and that thereafter, and on the 16th day of July, 1896, an order or decree was duly made and entered by the said court confirming said sale, and directing that the said Richard B. Knapp, as master commissioner, forthwith make, execute, acknowledge for record, and deliver to the said A. Marcus, Charles S. Fairchild, and Charles C. Beaman a deed conveying and transferring all the premises and property, rights, and franchises purchased by them as aforesaid, including the said steamer "Ocklahama;" and that afterwards, to wit, on the 18th day of July, 1896, the said Richard
886 B. Knapp duly made, executed, and delivered the said deed to the said A. Marcus, Charles S. Fairchild, and Charles C. Beaman.

Fifth. That afterwards, to wit, on the 17th day of August, 1896, the said A. Marcus, Charles S. Fairchild, and Charles C. Beaman duly made, executed, and delivered to The Oregon Railroad and Navigation Company, your petitioner herein, a deed conveying to your petitioner, for a valuable consideration, all of the property acquired by the said Marcus, Fairchild, and Beaman, including the said steamer "Ocklahama."

Sixth. That on the said 17th day of August, 1896, the Oregon Railway and Navigation Company, as required by said decree, duly made, executed, and delivered to your petitioner a deed conveying to your petitioner all of the property of the Oregon Railway and Navigation Company, including the said steamer "Ocklahama," and by way of further assurance did, on the 21st day of September, 1896, duly make, execute, and deliver to your petitioner a bill of sale of all of the steamers formerly owned by the Oregon Railway and Navigation Company, including the steamer "Ocklahama," duly reciting in said bill of sale the certificate of registry of the said steamer "Ocklahama," and that your petitioner is now the true and *bona fide* owner of said steamer.

Seventh. The Oregon Railroad and Navigation Company denies

each and every of the allegations contained in the second and third articles of the further answer of the said Malvina Short.

Eighth. Claimant admits that on October 21st and 22d,
887 1892, Marshal B. Short was in the employment of the Oregon Short Line and Utah Northern Railway Company, as captain of its steamboat "Ocklahama," on the Willamette and Columbia rivers.

Ninth. Claimant admits that on October 21st, 1892, said Marshal B. Short, under and in pursuance of the order and instructions of the Oregon Short Line and Utah Northern Railway Company, took the said barge under his charge and control, and towed the same with the said steamboat "Ocklahama" from the dock of the Oregon Short Line and Utah Northern Railway Company in the city of Portland to one of the docks of the Oregon Short Line and Utah Northern Railway Company at Astoria, Oregon, but denies that the barge was improperly constructed or was insufficient, unsafe, unseaworthy, or unprovided with suitable pumps or pumping apparatus, or unskillfully, carelessly, or negligently, or at all, overloaded or leaking, to any extent whatsoever.

Tenth. Claimant alleges that the allegations contained in the sixth paragraph of the said further answer of Malvina Short are wholly untrue, and that the facts are as hereinbefore alleged, to wit: 1. That the Oregon Railway and Navigation Company was at all the times hereinafter alleged a corporation duly created and organized by and under the laws of the State of Oregon, and was during the month of October, 1892, the owner of a certain barge or lighter known as the "Columbia;" that the Oregon Short Line and Utah Northern Railway Company was during the month of October, 1892, a corporation, duly organized and existing under and by virtue of an act of Congress of the United States, entitled "An act creating the Oregon Short Line Railway Company, a cor-
888 poration in the Territories of Utah, Idaho, and Wyoming, and for other purposes," approved August 2, 1892, and was during the month of October, 1892, engaged in the business of owning and operating steamboats and other vessels, and in owning and operating lighters and barges between Portland, in the State of Oregon, and Astoria, in said State, and elsewhere, and was during said month of October, 1892, the lessee from the Oregon Railway and Navigation Company of the said barge "Columbia," and was during said month of October operating the said barge "Columbia" under the terms and provisions of said lease, and had the sole and exclusive possession, charge, and control and management of the said barge "Columbia."

That on or about the 19th day of October, 1892, Robert Balfour, Stephen Williamson, Alexander Guthrie, Robert Brodie Forman, R. Bruce, and Walter J. Burns were partners, doing business in the city of Portland and elsewhere, under the firm name and style of Balfour, Guthrie & Co., and as such firm, on the said 19th day of October, 1892, loaded upon the barge "Columbia" a cargo of wheat to be transported by said barge from Portland, Oregon, to Astoria, Oregon; that the said barge was under the charge of a captain, who

had no connection with any other boat or vessel other than the said "Columbia," and the captain of the said barge, for and on behalf of the said "Columbia," executed and delivered to the said Balfour, Guthrie & Co. a shipping receipt or bill of lading for all the wheat carried upon said barge, to wit, eight thousand eight hundred and ninety-eight sacks, and the said shipping receipt
889 contained the following provision, to wit:

"In consideration of the reduced rate at which the articles covered by this receipt are carried, it is agreed by the undersigned, for and on behalf of the owner of the property, that the Oregon Short Line and Utah Northern Railway Company shall not be responsible for any injury or damage to the property described in this receipt not caused by the actual negligence of the said company or its agents."

That the said agreement contained in the said receipt was signed by the said Balfour, Guthrie & Co., the owners of the said wheat, and the said wheat was carried under the terms and provisions of the said shipping receipt and not otherwise.

3. That the said barge "Columbia" was on the said 19th day of October, 1892, taken in tow by some boat or vessel other than the "Ocklahama," and was towed from the dock at which she had been loaded to a point or place in the city of Portland known as the bone yard, and there remained from the 19th day of October, 1892, until the afternoon of the 21st day of October, 1892; that on the afternoon of the 21st day of October, 1892, the steamboat "Ocklahama" took said barge "Columbia" in tow, for the purpose of towing the said barge "Columbia" from the bone yard in Portland to the dock of the Oregon Railway and Navigation Company, then operated by the Oregon Short Line and Utah Northern Railway Company at Astoria, Oregon, at which said dock the said "Ocklahama" was to leave the said barge, and was not expected or intended to further tow the said barge; that no
890 shipping receipt was ever issued on behalf of the said "Ocklahama" by the said Balfour, Guthrie & Co. for the towage of the said barge; that on arrival of the said "Ocklahama" with the said barge at the dock in Astoria, Oregon, the said "Ocklahama" was under orders to return immediately to Portland, leaving the said barge alongside the said dock; that all went well with the said barge and her said cargo until the said barge, on the night of the 21st of October, 1892, reached Astoria, Oregon; that lying in front of the said dock at which the said barge "Columbia" was to tie up, and floating nearly level with the water, was a float or pontoon, which consisted of twelve-inch by twelve-inch timbers securely fastened together, said pontoon being 60 feet long, one foot thick, and four feet wide, and being fastened in front of the said dock for the purpose of preventing ships from chafing against the timbers of the said dock; that the said pontoon had no fixed location along the said dock, and was from time to time moved from place to place in front of the said dock; that the said barge "Columbia" had a sharp bow, and commencing at the said bow the deck of the said barge extended out over the hull for a distance of several feet,

so as to make a guard along the entire side of the said barge, and in making landings such guards protected the said hull from striking against the wharf or dock at which such landings were made; that the darkness of the night rendered it impossible for the pilot and captain in charge of the "Ocklahama" to see the pontoon, and in attempting to make a landing at said dock, the said barge
891 ran against the said pontoon with her bow, instead of striking against the said dock with the guard along the side of the said barge; that the stem or forefoot of the said barge struck the said pontoon with sufficient force to break the said stem or forefoot, and thereby the timbers of the said barge were started so as to cause a leak; that the said leak was not considered serious or dangerous by those in charge of the said barge, and was not serious or dangerous; that the persons in charge of the barge deemed it advisable to remove the said barge into more shallow water, and thereupon the said barge was taken behind the said dock and placed alongside the rear portion of said dock, where she rested on the bottom of the Columbia river, which was there composed of soft mud, and was listed against the said dock in a safe position; that all of the cargo upon the said barge was loaded upon her deck and was not injured in any manner whatsoever by reason of the said leak in her hold, that after the said barge had rested against the dock for about an hour and a half, the master of the said barge negligently caused the cargo on the deck of said barge to be shifted until the said barge was on an even keel and was no longer resting against the said dock; that at the said time, and for some time prior thereto, the tide in the Columbia river was ebbing; that when the said barge came to an even keel she remained in that position for a short time, when, the tide having ebbed, and she having no lateral support, the said barge keeled over away from the said dock, striking her bilge on the bottom of said river with great force and violence, and causing the cargo to shift and carry away the deck-house, and a large portion of said cargo slid into the river and the
892 hull of said barge was broken down by the shock; that the position in which the said barge was placed against the side of the dock was a proper and safe position, and from which the cargo of the said barge might easily have been removed to the said dock; that the collapse of the said barge "Columbia" was due to the unusual and severe strain to which the timbers of the said barge "Columbia" were subjected in the unnatural position in which she was placed when thrown upon her side; that as a result of the overturning of the said barge and the collapse thereof, and not otherwise, the wheat owned by the said Balfour, Guthrie & Co. was damaged; that the said steamer "Ocklahama" did not in any way cause the said injury; that the same occurred solely by reason of the negligence of the captain of the said barge as aforesaid; that the injury to the said wheat was caused solely by a peril over which the said "Ocklahama" and her officers and crew had no control, and which injury could not have been prevented by the exercise of any care on the part of the said "Ocklahama," her officers and crew.

4. Claimant alleges that the said barge "Columbia" was in all respects sound, staunch, and seaworthy, and was properly manned and equipped for the voyage in which she was engaged, and was under the control of proper and suitable officers, and that the said "Ocklahama" at the times hereinbefore mentioned was in all respects sound, staunch and seaworthy, and was properly manned and equipped and provided for the voyage in which she was engaged.

5. That it was not intended that the said "Ock-hama" should tow the said barge "Columbia" any further than the said dock at Astoria, Oregon, and that the said barge was to be delivered to the ship "Westgate" by some other tugboat, and that no contract was ever made with the said steamer "Ocklahama" or her owners thereof for the towage of the barge "Columbia" to the said "Westgate," and that the only contract existing for the towage of the said barge is that resulting by operation of law from the facts hereinbefore stated.

Eleventh. Claimant denies that it has any knowledge or information sufficient to form a belief as to any of the facts alleged in the seventh and eighth articles of the said further answer of the said Malvina Short, and each of the same, and leaves the said Malvina Short, and each such proof of such facts as she shall be able to produce.

Twelfth. Claimant denies that by reason of any of the matters alleged in the answer of the said Malvina Short, the estate of Marshal B. Short, deceased, or the said Malvina Short, as administratrix of said deceased, has been damaged in any sum whatsoever.

Thirteenth. The Oregon Railroad and Navigation Company further alleges that no libel was ever filed in this court in this cause by the said Malvina Short, as administratrix of Marshal B. Short, deceased, or otherwise, against the said steamer "Ocklahama," or her owners, or otherwise.

Wherefore, the Oregon Railroad and Navigation Company prays that the right, title, and interest of the said The Oregon Railroad and Navigation Company in and to the said "Ocklahama" may be declared to be superior and prior to that of the said Malvina Short, administratrix of Marshal B. Short, deceased, and that the said "Ocklahama" may be restored to the possession of the said The Oregon Railroad and Navigation Company, and that the said The Oregon Railroad and Navigation Company may have such other and further relief as may be just and equitable, and that the said The Oregon Railroad and Navigation Company may have its costs and disbursements.

COX, COTTON, TEAL & MINOR,
*Proctors for the Oregon Railroad and Navigation Company.*

STATE OF OREGON,
*County of Multnomah,* } ss:

I, W. W. Cotton, on oath, being first duly sworn, depose and say that I am the secretary of the Oregon Railroad and Navigation

Company; that I have read the foregoing answer of the said The Oregon Railroad and Navigation Company to the answer of Malvina Short, and the same is true as I verily believe.

W. W. COTTON.

Subscribed and sworn to before me this 29th day of July, 1897.

[SEAL.] W. C. BRISTOL,
*Notary Public in and for Oregon.*

Service by copy admitted at Portland, Ore., July 29, 1897.

E. B. WATSON,
*Proctor for Malvina Short.*

(Endorsed:) Filed July 28, 1897. E. D. McKee, clerk.

895 And afterwards, to wit, on the 28th day of July, 1897, there was duly filed in said court an answer of Oregon Railroad and Navigation Company to answer of Sven Anderson, in words and figures as follows, to wit:

In the District Court of the United States for the District of Oregon.

In the Matter of the Petition of the Oregon Railway and Navigation Company as the Owner of the Barge "Columbia" and the Oregon Short Line and Utah Northern Railway Company as Lessee Thereof.

*Answer of Oregon Railroad and Navigation Company to Answer of Sven Anderson.*

Now comes The Oregon Railroad and Navigation Company, claimant of the steamboat "Ocklahama," and for its answer to the answer of Sven Anderson, administrator of the estate of John August Peterson, deceased, alleges as follows:

First. That the Oregon Railway and Navigation Company, a corporation duly organized and existing under the laws of the State of Oregon, did, on or about the first day of June, 1885, make, execute, and deliver to the Farmers' Loan and Trust Company, a corporation duly organized and existing under the laws of the State of New York, a certain consolidated mortgage, bearing date the said first day of June, 1885, whereby, subject to a certain prior

896 mortgage dated July 1, 1879, made by the said Oregon Railway and Navigation Company to the said Farmers' Loan and Trust Company, the said Oregon Railway and Navigation Company did mortgage to the said Farmers' Loan and Trust Company all and singular its property, real, personal, and mixed, including the said steamer "Ocklahama," to secure a certain series of five per cent. consolidated mortgage bonds. That said mortgage, during the year 1885, was duly recorded according to law in the office of the collector of customs of the port of Portland, the port of registry of the said steamboat "Ocklahama," and all persons thereafter dealing with the said steamboat had due notice of said mortgage and of

the interest of the said Farmers' Loan and Trust Company in and to the said boat as trustee under the said mortgage.

Second. That under and in pursuance of the provisions of said consolidated mortgage there were duly issued, and at the date of the decree hereinafter mentioned there were outstanding, such consolidated mortgage bonds to the amount of twelve million five hundred and eighty-three thousand ($12,583,000) dollars, which said consolidated mortgage bonds bore interest at the rate of five per cent. per annum, payable semi-annually on the first days of June and December in each year, and that the said Oregon Railway and Navigation Company did, on or about the first day of December, 1893, make default in the payment of the interest on the said consolidated mortgage bonds which became due on the said first day of December, 1893, and did thereafter, on or about the first day of June, 1894, likewise make default in the payment of the in-
897 terest on the said consolidated mortgage bonds which became payable on the first day of June, 1894, and that such proceedings were thereafter duly had under and in pursuance of the terms of the said consolidated mortgage that the principal of all of the bonds secured by the said consolidated mortgage became due and payable prior to the date of the commencement of the suit hereinafter mentioned.

Third. That after such default in the payment of interest, and after the principal of the said consolidated mortgage bonds became due as aforesaid, there was, on or about the 25th day of June, 1894, begun in the circuit court of the United States for the district of Oregon a suit in equity to foreclose the said consolidated mortgage, in which suit the said Farmers' Loan and Trust Company was complainant and The Oregon Railway and Navigation Company and others were defendants, and thereafter in said suit, by proceedings duly had therein, E. McNeill was appointed receiver of all of the property of the Oregon Railway and Navigation Company, including the said steamboat "Ocklahama," and duly qualified as such receiver, and entered into the possession of the property of the said Oregon Railway and Navigation Company, including the said steamer "Ocklahama," and remained in the possession of the said steamer "Ocklahama" until said steamer was taken from the custody of the said McNeill by the marshal of this court.

Fourth. That in said suit in equity against the Oregon Railway and Navigation Company to foreclose said mortgage, such proceedings were thereafter duly had in said court that on the 10th day of August, 1895, a decree was duly entered in said court
898 whereby it was ordered that in default of certain payments therein mentioned, all of the property of the Oregon Railway and Navigation Company, including the said steamer "Ocklahama," should be sold as an entirety, and without an appraisement or right of redemption, by Richard B. Knapp, who was by said decree appointed master commissioner for such purpose, at public auction to the highest bidder therefor, and that afterwards, to wit, on the 9th day of July, 1896, at the time and place fixed in and by said decree, and in the manner required by said decree, the said Richard B.

Knapp, as master commissioner, sold all of the property of the Oregon Railway and Navigation Company at public auction to A. Marcus, Charles S. Fairchild, and Charles C. Beaman, for the sum of nine million four hundred and thirty-seven thousand two hundred and fifty ($9,437,250.00) dollars; that the said Richard B. Knapp did, after such sale, and on or about the 9th day of July, 1896, duly make a report thereof to the said circuit court of the United States for the district of Oregon, which said report was duly filed in the office of the clerk of said court on the 9th day of July, 1896, and that thereafter, and on the 16th day of July, 1896, an order or decree was duly made and entered by the said court confirming said sale, and directing that the said Richard B. Knapp, as master commissioner, forthwith make, execute, acknowledge for record, and deliver to the said A. Marcus, Charles S. Fairchild, and Charles C. Beaman a deed conveying and transferring all the premises and property, rights, and franchises purchased by them as aforesaid, including the said steamer "Ocklahama;" and that afterwards, to wit, on the 18th day of July, 1896, the said Richard
899 B. Knapp duly made, executed, and delivered the said deed to the said A. Marcus, Charles S. Fairchild, and Charles C. Beaman.

Fifth. That afterwards, to wit, on the 17th day of August, 1896, the said A. Marcus, Charles S. Fairchild, and Charles C. Beaman duly made, executed, and delivered to The Oregon Railroad and Navigation Company, your petitioner herein, a deed conveying to your petitioner, for a valuable consideration, all of the property acquired by the said Marcus, Fairchild, and Beaman, including the said steamer "Ocklahama."

Sixth. That on the said 17th day of August, 1896, the Oregon Railway and Navigation Company, as required by said decree, duly made, executed, and delivered to your petitioner a deed conveying to your petitioner all of the property of the Oregon Railway and Navigation Company, including the said steamer "Ocklahama," and by way of further assurance did, on the 21st day of September, 1896, duly make, execute and deliver to your petitioner a bill of sale of all of the steamers formerly owned by the Oregon Railway and Navigation Company, including the steamer "Ocklahama," duly reciting in said bill of sale the certificate of registry of the said steamer "Ocklahama," and that your petitioner is now the true and *bona fide* owner of said steamer.

Seventh. The Oregon Railroad and Navigation Company denies each and every of the allegations contained in the second and third articles of the further answer of the said Anderson.

Eighth. Claimant admits that on October 21st and 22d,
900 1892, John August Peterson was in the employ of the Oregon Short Line and Utah Northern Railway Company as a deck hand on the steamboat "Ocklahama," and that he was under the authority and subject to the orders and directions of the captain thereof, and that during the said time Marshal B. Short was in the employment of the said Oregon Short Line and Utah Northern Railway Company as captain of the said steamboat.

Ninth. Claimant admits that on October 21, 1892, said Marshal B. Short, under and in pursuance of the orders and instructions of the Oregon Short Line and Utah Northern Railway Company, took the said barge under his charge and control, and towed the same from the dock of the Oregon Short Line and Utah Northern Railway Company at Portland, Oregon, to one of the docks of the Oregon Short Line and Utah Northern Railway Company at Astoria, Oregon, but denies that the said barge was improperly constructed or was insufficient, unsafe, or unskillfully, carelessly, or negligently, or at all, overloaded or leaking to any extent whatsoever.

Tenth. Claimant alleges that the allegations contained in the seventh paragraph of the said further answer of said Anderson are wholly untrue, and that the facts are as hereinafter alleged, to wit:

1. That the Oregon Railway and Navigation Company was at all the times hereinafter alleged a corporation duly created and organized by and under the laws of the State of Oregon, and was during the month of October, 1892, the owner of a certain barge or lighter known as the "Columbia;" that the Oregon Short Line and Utah
Northern Railway Company was during the month of October,
901 1892, a corporation, duly organized and existing under and by virtue of an act of Congress of the United States, entitled "An act creating the Oregon Short Line Railway Company, a corporation in the Territories of Utah, Idaho, and Wyoming, and for other purposes," approved August 2, 1892, and was during the month of October, 1892, engaged in the business of owning and operating steamboats and other vessels, and in owning and operating lighters and barges between Portland, in the State of Oregon, and Astoria, in said State, and elsewhere, and was during said month of October, 1892, the lessee from the Oregon Railway and Navigation Company of the said barge "Columbia," and was during said month of October operating the said barge "Columbia" under the terms and provisions of said lease, and had the sole and exclusive possession, charge, and control and management of the said barge "Columbia."

2. That on or about the 19th day of October, 1892, Robert Balfour, Stephen Williamson, Alexander Guthrie, Robert Brodie Forman, R. Bruce, and Walter J. Burns were partners, doing business in the city of Portland and elsewhere under the firm name and style of Balfour, Guthrie & Co., and as such firm, on the said 19th day of October, 1892, loaded upon the barge "Columbia" a cargo of wheat to be transported by said barge from Portland, Oregon, to Astoria, Oregon; that the said barge was under the charge of a captain, who had no connection with any other boat or vessel other than the said "Columbia," and the captain of the said barge, for and on behalf of the said "Columbia," executed and delivered to the said Balfour,
Guthrie & Co. a shipping receipt or bill of lading for all the
902 wheat carried upon the said barge, to wit, eight thousand eight hundred and ninety-eight sacks, and the said shipping receipt contained the following provision, to wit:

"In consideration of the reduced rate at which the articles covered by this receipt are carried, it is agreed by the undersigned, for

and on behalf of the owner of the property, that the Oregon Short Line and Utah Northern Railway Company shall not be responsible for any injury or damage to the property described in this receipt not caused by the actual negligence of the said company or its agents."

That the said agreement contained in the said receipt was signed by the said Balfour, Guthrie & Co., the owner of the said wheat, and the said wheat was carried under the terms and provisions of the said shipping receipt and not otherwise.

3. That the said barge "Columbia" was on the said 19th day of October, 1892, taken in tow by some boat or vessel other than the "Ocklahama," and was towed from the dock at which she had been loaded to a point or place in the city of Portland known as the bone yard, and there remained from the 19th day of October, 1892, until the afternoon of the 21st day of October, 1892; that on the afternoon of the 21st day of October, 1892, the steamboat "Ocklahama" took said barge "Columbia" in tow, for the purpose of towing the said barge "Columbia" from the bone yard in Portland to the dock of the Oregon Railway and Navigation Company, then operated by the Oregon Short Line and Utah Northern Railway Company at Astoria, Oregon, at which said dock the said "Ocklahama" was to leave the said barge, and was not expected or
903 intended to further tow the said barge; that no shipping receipt was ever issued on behalf of the said "Ocklahama," and no contract was made with the said "Ocklahama" by the said Balfour, Guthrie & Co. for the towage of the said barge; that on arrival of the said "Ocklahama" with the said barge at the dock in Astoria, Oregon, the said "Ocklahama" was under orders to return immediately to Portland, leaving the said barge alongside the said dock; that all went well with the said barge and her said cargo until the said barge on the night of the 21st of October, 1892, reached Astoria, Oregon; that lying in front of the said dock at which the said barge "Columbia" was to tie up, and floating nearly level with the water, was a float or pontoon, which consisted of twelve-inch by twelve-inch timbers securely fastened together, said pontoon being 60 feet long, one foot thick, and four feet wide, and being fastened in front of the said dock for the purpose of preventing ships from chafing against the timbers of the said dock; that the said pontoon had no fixed location along the said dock, and was from time to time moved from place to place in front of the said dock; that the said barge "Columbia" had a sharp bow, and commencing at the said bow the deck of the said barge extended out over the hull for a distance of several feet, so as to make a guard along the entire side of the said barge, and in making landings such guards protected the said hull from striking against the wharf or dock at which said landings were made; that the darkness of the night rendered it impossible for the pilot and captain in charge of the "Ocklahama" to see the pontoon, and in attempting to make a landing at said dock, the said barge ran against
904 the said pontoon with her bow, instead of striking against the said dock with the guard alongside of the said barge;

that the stem or forefoot of the said barge struck the said pontoon with sufficient force to break the said stem or forefoot, and thereby the timbers of the said barge were started so as to cause a leak; that the said leak was not considered serious or dangerous by those in charge of the said barge, and was not serious or dangerous; that the persons in charge of the barge deemed it advisable to remove the said barge into more shallow water, and thereupon the said barge was taken behind the said dock and placed alongside the rear portion of said dock, where she rested on the bottom of the Columbia river, which was there composed of soft mud, and was listed against the said dock in a safe position; that all of the cargo upon the said barge was loaded upon her deck, and was not injured in any manner whatsoever by reason of the said leak in her hold; that after the said barge had rested against the dock for about an hour and a half, the master of the said barge negligently caused the cargo on the deck of said barge to be shifted until said barge was on an even keel and was no longer resting against said dock; that at the said time, and for some time prior thereto, the tide in the Columbia river was ebbing; that when the said barge came to an even keel she remained in that position for a short time, when, the tide having ebbed and she having no lateral support, the said barge keeled over away from the said dock, striking her bilge on the bottom of said river with great force and violence, and causing the cargo to shift and carry away the deck-house, and a large portion of said
905 cargo slid into the river and the hull of said barge was broken down by the shock; that the position in which the said barge was placed against the side of the dock was a proper and safe position, and from which the cargo of the said barge might easily have been removed to the said dock; that the collapse of the said barge "Columbia" was due to the unusual and severe strain to which the timbers of the said barge were subjected in the unnatural position in which she was placed when thrown upon her side; that as a result of the overturning of the said barge and the collapse thereof, and not otherwise, the wheat owned by the said Balfour, Guthrie & Co. was damaged; that the said steamer "Ocklahama" did not in any way cause the said injury; that the same occurred solely by reason of the negligence of the captain of the said barge as aforesaid; that the injury to the said wheat was caused solely by a peril over which the said "Ocklahama" and her officers and crew had no control and which injury could not have been prevented by the exercise of any care on the part of the said "Ocklahama," her officers and crew.

4. Claimant alleges that the said barge "Columbia" was in all respects sound, staunch, and seaworthy, and was properly manned and equipped for the voyage in which she was engaged, and was under the control of proper and suitable officers, and that the said "Ocklahama" at the times hereinbefore mentioned was in all respects sound, staunch, and seaworthy, and was properly manned and equipped and provided for the voyage in which she was engaged.

5. That it was not intended that the said "Ocklahama" should

tow the said barge "Columbia" any further than the said
906 dock at Astoria, Oregon, and that the said barge was to be delivered to the ship "Westgate" by some other tugboat, and that no contract was ever made with the said steamer "Ocklahama" or her owners thereof for the towage of the said barge "Columbia" to the said "Westgate," and that the only contract existing for the towage of the said barge is that resulting by operation of law from the facts hereinbefore stated.

Eleventh. Claimant denies that it has any knowledge or information sufficient to form a belief as to any of the facts alleged in the eighth and ninth articles of the said further answer of the said Anderson, and leaves the said Anderson to make such proof of such facts as he shall be able to produce.

Twelfth. Claimant denies that by reason of any of the matters and premises, the said Sven Anderson, as administrator, has been damaged in any sum whatsoever.

Thirteenth. The Oregon Railroad and Navigation Company further alleges that no libel was ever filed in this court in this cause by the said Sven Anderson, as administrator of the estate of John August Peterson, or otherwise, against the said "Ocklahama," or her owners or otherwise.

Wherefore, the Oregon Railroad and Navigation Company prays that the right, title, and interest of the said The Oregon Railroad and Navigation Company in and to the said "Ocklahama" may be declared to be prior and superior to that of the said Sven Anderson, as administrator of the estate of John August Peterson, deceased, and that the said "Ocklahama" may be restored to the possession of the said The Oregon Railroad and Navigation
907 Company, and that the said The Oregon Railroad and Navigation Company may have such other and further relief as may be just and equitable, and that the said The Oregon Railroad and Navigation Company may have its costs and disbursements.

COX, COTTON, TEAL & MINOR.
*Proctors for the Oregon Railroad and Navigation Company.*

STATE OF OREGON, } ss:
*County of Multnomah,* }

I, W. W. Cotton, on oath, being first duly sworn, depose and say that I am the secretary of the Oregon Railroad and Navigation Company; that I have read the foregoing answer of the said The Oregon Railroad and Navigation Company to the answer of Sven Anderson, and the same is true as I verily believe.

W. W. COTTON.

Subscribed and sworn to before me this 29 day of July, 1897.
[SEAL.] W. C. BRISTOL,
*Notary Public in and for Oregon.*

Service by copy admitted at Portland, Ore., July 29, 1897.
E. B. WATSON,
*Proctor for Sven Anderson.*

Filed July 28, '97.

908 And afterwards, to wit, on the 28th day of July, 1897, there was duly filed in said court an answer of the Oregon Railroad and Navigation Company to answer of Anna C. Larsen, in words and figures as follows, to wit:

In the District Court of the United States for the District of Oregon.

In the Matter of the Petition of the Oregon Railway and Navigation Company as the Owner of the Barge "Columbia" and the Oregon Short Line and Utah Northern Railway Company as Lessee Thereof.

*Answer of Oregon Railroad and Navigation Company to Answer of Anna C. Larsen.*

Now comes The Oregon Railroad and Navigation Company, claimant of the steamboat "Ocklahama," and for its answer to the answer of Anna C. Larsen, mother of John August Peterson, deceased, alleges as follows:

First. That the Oregon Railway and Navigation Company, a corporation duly organized and existing under the laws of the State of Oregon, did, on or about the first day of June, 1885, make, execute, and deliver to the Farmers' Loan and Trust Company, a corporation duly organized and existing under the laws of the State of New York, a certain consolidated mortgage bearing date the said first day of June, 1885, whereby, *the* subject to a certain

909 prior mortgage dated July 1, 1879, made by the said Oregon Railway and Navigation Company to the said Farmers' Loan and Trust Company, the said Oregon Railway and Navigation Company did mortgage to the said Farmers' Loan and Trust Company all and singular its property, real, personal, and mixed, including the said steamer "Ocklahama," to secure a certain series of five per cent. consolidated mortgage bonds. That said mortgage, during the year 1885, was duly recorded according to law in the office of the collector of customs of the port of Portland, the port of registry of the said steamboat "Ocklahama," and all persons thereafter dealing with the said steamboat had due notice of said mortgage and of the interest of the said Farmers' Loan and Trust Company in and to the said boat as trustee under the said mortgage.

Second. That under and in pursuance of the provisions of said consolidated mortgage there were duly issued, and at the date of the decree hereinafter mentioned there were outstanding, such consolidated mortgage bonds to the amount of twelve million five hundred and eighty-three thousand ($12,583,000) dollars, which said consolidated mortgage bonds bore interest at the rate of five per cent. per annum, payable semi-annually on the first days of June and December in each year, and that the said Oregon Railway and Navigation Company did, on or about the first day of December, 1893, make default in the payment of the interest on the said consolidated mortgage bonds which became due on the said first day of December, 1893, and did thereafter, on or about the first day

of June, 1894, likewise make default in the payment of the
910 interest on the said consolidated mortgage bonds which became payable on the first day of June, 1894, and that such proceedings were thereafter duly had under and in pursuance of the terms of the said consolidated mortgage that the principal of all of the bonds secured by the said consolidated mortgage became due and payable prior to the date of the commencement of the suit hereinafter mentioned.

Third. That after such default in the payment of interest, and after the principal of the said consolidated mortgage bonds became due as aforesaid, there was, on or about the 25th day of June, 1894, begun in the circuit court of the United States for the district of Oregon a suit in equity to foreclose the said consolidated mortgage, in which suit the said Farmers' Loan and Trust Company was complainant and The Oregon Railway and Navigation Company and others were defendants, and thereafter in said suit, by proceedings duly had therein, E. McNeill was appointed receiver of all of the property of the Oregon Railway and Navigation Company, including the said steamboat "Ocklahama," and duly qualified as such receiver, and entered into the possession of the property of the said Oregon Railway and Navigation Company, including the said steamer "Ocklahama," and remained in the possession of the said steamer "Ocklahama" until said steamer was taken from the custody of the said McNeill by the marshal of this court.

Fourth. That in said suit in equity against the Oregon Railway and Navigation Company to foreclose said mortgage, such proceedings were thereafter duly had in said court that on the 10th day of
August, 1895, a decree was duly entered in said court whereby
911 it was ordered that in default of certain payments therein mentioned all of the property of the Oregon Railway and Navigation Company, including the said steamer "Ocklahama," should be sold as an entirety, and without an appraisement or right of redemption, by Richard B. Knapp, who was by said decree appointed master commissioner for such purpose, at public auction to the highest bidder therefor, and that afterwards, to wit, on the 9th day of July, 1896, at the time and place fixed in and by said decree, and in the manner required by said decree, the said Richard B. Knapp, as master commissioner, sold all of the property of the Oregon Railway and Navigation Company at public auction to A. Marcus, Charles S. Fairchild, and Charles C. Beaman for the sum of nine million four hundred and thirty-seven thousand two hundred and fifty ($9,437,250.00) dollars; that the said Richard B. Knapp did, after such sale, and on or about the 9th day of July, 1896, duly make a report thereof to the said circuit court of the United States for the district of Oregon, which said report was duly filed in the office of the clerk of said court on the 9th day of July, 1896, and that thereafter, and on the 16th day of July, 1896, an order or decree was duly made and entered by the said court confirming said sale, and directing that the said Richard B. Knapp, as master commissioner, forthwith make, execute, acknowledge for record, and deliver to the said A. Marcus, Charles S. Fairchild, and Charles C. Beaman

a deed conveying and transferring all the premises and property, rights, and franchises purchased by them as aforesaid, including the said steamer "Ocklahama;" and that afterwards, to wit,
912 on the 18th day of July, 1896, the said Richard B. Knapp duly made, executed, and delivered the said deed to the said A. Marcus, Charles S. Fairchild, and Charles C. Beaman.

Fifth. That afterwards, to wit, on the 17th day of August, 1896, the said A. Marcus, Charles S. Fairchild, and Charles C. Beaman duly made, executed, and delivered to The Oregon Railroad and Navigation Company, your petitioner herein, a deed conveying to your petitioner, for a valuable consideration, all of the property acquired by the said Marcus, Fairchild, and Beaman, including the said steamer "Ocklahama."

Sixth. That on the said 17th day of August, 1896, the Oregon Railway and Navigation Company, as required by said decree, duly made, executed, and delivered to your petitioner a deed conveying to your petitioner all of the property of the Oregon Railway and Navigation Company, including the said steamer "Ocklahama," and by way of further assurance did, on the 21st day of September, 1896, duly make, execute, and deliver to your petitioner a bill of sale of all of the steamers formerly owned by the Oregon Railway and Navigation Company, including the steamer "Ocklahama," duly reciting in said bill of sale the certificate of registry of the said steamer "Ocklahama," and that your petitioner is now the true and *bona fide* owner of said steamer.

Seventh. The Oregon Railroad and Navigation Company denies each and every of the allegations contained in the second and third articles of the further answer of the said Anna C. Larson.

Eighth. The claimant admits that on October 21st and 22d,
913 1892, John August Peterson was in the employ of the Oregon Short Line and Utah Northern Railway Company, as a deck hand on the steamboat "Ocklahama." He was under the authority and subject to the orders and direction of the captain thereof, and that during said time Marshal B. Short was in the employment of the said Oregon Short Line and Utah Northern Railway Company, as captain of the said steamboat.

Ninth. Claimant admits that on October 21st said Marshal B. Short, under and in pursuance of the orders and directions of the Oregon Short Line and Utah Northern Railway Company, took the said barge under his charge and control, and towed the same from the dock of the Oregon Short Line and Utah Northern Railway Company at Portland, Oregon, to one of the docks of the Oregon Short Line and Utah Northern Railway Company at Astoria, Oregon, but denies that the said barge was improperly constructed, or was insufficient, unsafe, or was unskillfully, carelessly, or negligently, or at all, overloaded or leaking, to any extent whatsoever.

Tenth. Claimant alleges that the allegations contained in the seventh paragraph of the said further answer of Anna C. Larson are wholly untrue, and that the facts are as hereinafter alleged, to wit:

1. That the Oregon Railway and Navigation Company was at all

the times hereinafter alleged a corporation duly created and organized by and under the laws of the State of Oregon, and was during the month of October, 1892, the owner of a certain barge or lighter known as the "Columbia;" that the Oregon Short Line and Utah Northern Railway Company was during the month of Oc-
914 tober, 1892, a corporation duly organized and existing under and by virtue of an act of Congress of the United States, entitled "An act creating the Oregon Short Line Railway Company a corporation in the Territories of Utah, Idaho, and Wyoming, and for other purposes," approved August 2, 1892, and was during the month of October, 1892, engaged in the business of owning and operating steamboats and other vessels, and in owning and operating lighters and barges between Portland, in the State of Oregon, and Astoria, in said State, and elsewhere, and was during said month of October, 1892, the lessee from the Oregon Railway and Navigation Company of the said barge "Columbia," and was during said month of October operating the said barge "Columbia" under the terms and provisions of said lease, and had the sole and exclusive possession, charge, and control and management of the said barge "Columbia."

2. That on or about the 19th day of October, 1892, Robert Balfour, Stephen Williamson, Alexander Guthrie, Robert Brodie Forman, R. Bruce, and Walter J. Burns were partners, doing business in the city of Portland and elsewhere, under the firm name and style of Balfour, Guthrie & Co., and as such firm, on the said 19th day of October, 1892, loaded upon the barge "Columbia" a cargo of wheat to be transported by said barge from Portland, Oregon, to Astoria, Oregon; that the said barge was under the charge of a captain, who has no connection with any other boat or vessel other than the said "Columbia," and the captain of the said barge, for and on behalf of the said "Columbia," executed and delivered to the said Balfour, Guthrie & Co. a shipping receipt or bill of lading for all the wheat carried upon said barge, to wit, eight
915 thousand eight hundred and ninety-eight sacks, and the said shipping receipt contained the following provisions, to wit:

"In consideration of the reduced rate at which the articles covered by this receipt are carried, it is agreed by the undersigned, for and on behalf of the owner of the property, that the Oregon Short Line and Utah Northern Railway Company shall not be responsible for any injury or damage to the property described in this receipt not caused by the actual negligence of the said company or its agents."

That the said agreement contained in the said receipt was signed by the said Balfour, Guthrie & Co., the owners of the said wheat, and the said wheat was carried under the terms and provisions of the said shipping receipt and not otherwise.

3. That the said barge "Columbia" was on the said 19th day of October, 1892, taken in tow by some boat or vessel other than the "Ocklahama," and was towed from the dock at which she had been loaded to a point or place in the city of Portland known as the bone yard, and there remained from the 19th day of October, 1892, until

the afternoon of the 21st day of October, 1892; that on the afternoon of the 21st day of October, 1892, the steamboat "Ocklahama" took said barge "Columbia" in tow, for the purpose of towing the said barge "Columbia" from the bone yard in Portland to the dock of the Oregon Railway and Navigation Company, then operated by the Oregon Short Line and Utah Northern Railway Company at Astoria, Oregon, at which said dock the said "Ocklahama"
916 was to leave the said barge, and was not expected or intended to further tow the said barge; that no shipping receipt was ever issued on behalf of the said "Ocklahama," and no contract was made with the said "Ocklahama" by the said Balfour, Guthrie & Co. for the towage of the said barge; that on arrival of the said "Ocklahama" with the said barge at the dock at Astoria, Oregon, the said "Ocklahama" was under orders to return immediately to Portland, leaving the said barge alongside the said dock; that all went well with the said barge and her said cargo until the said barge, on the night of the 21st of October, 1892, reached Astoria, Oregon; that lying in front of the said dock at which the said barge "Columbia" was to tie up, and floating nearly level with the water, was a float or pontoon, which consisted of twelve-inch by twelve-inch timbers securely fastened together, said pontoon being 60 feet long, one foot thick, and four feet wide, and being fastened in front of the said dock for the purpose of preventing ships from chafing against the timbers of the said dock; that the said pontoon had no fixed location along the said dock, and was from time to time moved from place to place in front of the said dock; that the said barge "Columbia" had a sharp bow, and commencing at the said bow the deck of the said barge extended out over the hull for a distance of several feet, so as to make a guard along the entire side of the said barge, and in making landings such guards protected the said hull from striking against the wharf or dock at which said landings were made; that the darkness of the night rendered it impossible for the pilot and captain in charge of
the "Ocklahama" to see the pontoon, and in attempting to
917 make a landing at said dock the said barge ran against the said pontoon with her bow, instead of striking against the said dock with the guard alongside of the said barge; that the stem or forefoot of the said barge struck the said pontoon with sufficient force to break the said stem or forefoot, and thereby the timbers of the said barge were started so as to cause a leak; that the said leak was not considered serious or dangerous by those in charge of the said barge, and was not serious or dangerous; that the persons in charge of the barge deemed it advisable to remove the said barge into more shallow water, and thereupon the said barge was taken behind the said dock and placed alongside the rear portion of said dock, where she rested on the bottom of the Columbia river, which was there composed of soft mud, and was listed against the said dock in a safe position; that all of the cargo upon the said barge was loaded upon her deck, and was not injured in any manner whatsoever by reason of the said leak in her hold; that after the said barge had rested against the dock for about an hour and a half, the

master of the said barge negligently caused the cargo on the deck of said barge to be shifted until said barge was on an even keel and was no longer resting against said dock; that at the said time, and for some time prior thereto, the tide in the Columbia river was ebbing; that when the said barge came to an even keel she remained in that position for a short time, when the tide having ebbed and she having no lateral support, the said barge keeled over away from the said dock, striking her bilge on the bottom of said river with great force and violence and causing the cargo to shift and carry
918 away the deck-house, and a large portion of said cargo slid into the river and the hull of said barge was broken down by the shock; that the position in which the said barge was placed against the side of the dock was a proper and safe position, and from which the cargo of the said barge might easily have been removed to the said dock; that the collapse of the said barge "Columbia" was due to the unusual and severe strain to which the timbers of the said barge were subjected in the unnatural position in which she was placed when thrown upon her side; that as a result of the overturning of the said barge and the collapse thereof, and not otherwise, the wheat owned by the said Balfour, Guthrie & Co. was damaged; that the said steamer "Ocklahama" did not in any way cause the said injury; that the same occurred solely by reason of the negligence of the captain of the said barge as aforesaid; that the injury to the said wheat was caused solely by a peril over which the said "Ocklahama" and her officers and crew had no control, and which injury could not have been prevented by the exercise of any care on the part of the said "Ocklahama," her officers and crew.

4. Claimant alleges that the said barge "Columbia" was in all respects sound, staunch, and seaworthy, and was properly manned and equipped for the voyage in which she was engaged, and was under the control of proper and suitable officers, and that the said "Ocklahama" at the times hereinbefore mentioned was in all respects sound, staunch, and seaworthy, and was properly manned and equipped and provided *and* the voyage in which she was engaged.

919 5. That it was not intended that the said "Ocklahama" should tow the said barge "Columbia" any further than the said dock at Astoria, Oregon, and that the said barge was to be delivered to the ship "Westgate" by some other tugboat, and that no contract was ever made with the said steamer "Ocklahama" or her owners thereof for the towage of the said barge "Columbia" to the said "Westgate," and that the only contract existing for the towage of the said barge is that resulting by operation of law from the facts hereinbefore stated.

Eleventh. Claimant denies that it has any knowledge or information sufficient to form a belief as to the facts alleged in the seventh, ninth, tenth, eleventh, and twelfth articles of the said further answer of the said Anna C. Larson, and each of the same, and leaves the said Anna C. Larson to make such proof of the facts as she shall be able to produce.

Twelfth. Claimant denies that by reason of any of the matters alleged in the answer of the said Anna C. Larson, the said Anna C. Larson has been damaged in the sum of six thousand ($6,000.00) dollars, or any sum whatsoever.

Thirteenth. The Oregon Railroad and Navigation Company further alleges that no libel was ever filed in this court in this cause by the said Anna C. Larson against the said "Ocklahama" or her owners, or otherwise.

Wherefore, the Oregon Railroad and Navigation Company prays that the right, title, and interest of the said The Oregon Railroad and Navigation Company in and to the said "Ocklahama" may be declared to be superior and prior to that of the said Anna C.
920 Larson, and that the said "Ocklahama" may be restored to the possession of the said The Oregon Railroad and Navigation Company, and that the said The Oregon Railroad and Navigation Company may have such other and further relief as may be just and equitable, and that the said The Oregon Railroad and Navigation Company may have its costs and disbursements.

COX, COTTON, TEAL & MINOR,
*Proctors for the Oregon Railroad and Navigation Company.*

STATE OF OREGON,
*County of Multnomah,* } ss:

I, W. W. Cotton, on oath, being first duly sworn, depose and say that I am the secretary of the Oregon Railroad and Navigation Company; that I have read the foregoing answer of the said The Oregon Railroad and Navigation Company to the answer of Anna C. Larson, and the same is true as I verily belive.

W. W. COTTON.

Subscribed and sworn to before me this 29 day of July, 1897.

[SEAL.] W. C. BRISTOL,
*Notary Public in and for Oregon.*

Service by copy admitted at Portland, Ore., July 29, 1897.

E. B. WATSON,
*Of Proctors for Anna C. Larson.*

(Endorsed:) Filed July 28, 1897. E. D. McKee, clerk.

921 And afterwards, to wit, on the 31st day of July, 1897, there was duly filed in said court exceptions of Malvina Short, to answer of the Oregon Railroad and Navigation Company, in words and figures as follows, to wit:

In the District Court of the United States for the District of Oregon.

In the Matter of the Petition of the Oregon Railroad and Navigation Company as the Owner of the Barge "Columbia" and the Oregon Short Line and Utah Northern Railway Company as Lessee Thereof

*Exceptions of Malvina Short to Answer of Oregon Railroad and Navigation Company.*

To the Hon. Charles B. Bellinger, judge of the district court of the United States for the district of Oregon:

The exceptions of Malvina Short, administratrix of the estate of Marshal B. Short, deceased, respondent, to the answer of Oregon Railroad and Navigation Company to her answer to the petition herein, allege that said answer is informal and insufficient as follows:

First exception. That the court has no jurisdiction to allow the said answer of the Oregon Railroad and Navigation Company to be filed in this cause, or to entertain or consider the same.

922 Second exception. That said Oregon Railroad and Navigation Company is not a proper party to this cause, and is not entitled to be heard therein.

Third exception. That said answer of the Oregon Railroad and Navigation Company does not state facts sufficient to constitute any cause of suit, or ground of defense, or to entitle said Oregon Railroad and Navigation Company to any relief herein.

E. B. WATSON,
*Proctor for Respondent Malvina Short, Administratrix of the Estate of Marshal B. Short, Deceased.*

Service by copy admitted at Portland, Or., July 31st, 1897.

W. W. COTTON,
*Proctor for Oregon Railroad and Navigation Company.*

(Endorsed:) Filed July 31, 1897. E. D. McKee, clerk.

And afterwards, to wit, on the 31st day of July, 1897, there was duly filed in said court exceptions of Sven Anderson to answer of the Oregon Railroad and Navigation Company, in words and figures as follows, to wit:

In the District Court of the United States for the District of Oregon.

In the Matter of the Petition of the Oregon Railroad and Navigation Company as the Owner of the Barge "Columbia" and the Oregon Short Line and Utah Northern Railway Company as Lessee Thereof.

923 *Exceptions of Sven Anderson to Answer of Oregon Railroad and Navigation Company.*

To the Hon. Charles B. Bellinger, judge of the district court of the United States for the district of Oregon:

The exceptions of Sven Anderson, administrator of the estate of John August Peterson, deceased, respondent, to the answer of Oregon Railroad and Navigation Company to his answer to the petition herein, allege that said answer is informal and insufficient as follows:

First exception. That the court has no jurisdiction to allow the said answer of the Oregon Railroad and Navigation Company to be filed in this cause, or to entertain or consider the same.

Second exception. That said Oregon Railroad and Navigation Company is not a proper party to this cause, and is not entitled to be heard therein.

Third exception. That said answer of the Oregon Railroad and Navigation Company does not state facts sufficient to constitute any cause of suit, or ground of defense, or to entitle said Oregon Railroad and Navigation Company to any relief herein.

E. B. WATSON,
*Proctor for Respondent Sven Anderson, Administrator of the Estate of John August Peterson, Deceased.*

Service by copy admitted at Portland, Or., July 31st, 1897.

W. W. COTTON,
*Proctor for Oregon Railroad and Nav. Co.*

(Endorsed:) Filed July 31, 1897. E. D. McKee, clerk.

924 And afterwards, to wit, on the 31st day of July, 1897, there *was* duly filed in said court exceptions of Anna C. Larson to answer of the Oregon Railroad and Navigation Company, in words and figures as follows, to wit:

In the District Court of the United States for the District of Oregon.

In the Matter of the Petition of the Oregon Railroad and Navigation Company as the Owner of the Barge "Columbia" and the Oregon Short Line and Utah Northern Railway Company as Lessee Thereof.

*Exceptions of Anna C. Larsen to Answer of Oregon Railroad and Navigation Company.*

To the Hon. Charles B. Bellinger, judge of the district court of the United States for the district of Oregon:

The exceptions of Anna C. Larson, mother of John August Peterson, deceased, respondent, to the answer of Oregon Railroad and Navigation Company to her answer to the petition herein allege that said answer is informal and insufficient as follows:

First exception. That the court has no jurisdiction to allow the said answer of the Oregon Railroad and Navigation Company to be filed in this cause, or to entertain or consider the same.

925 Second exception. That said Oregon Railroad and Navigation Company is not a proper party to this cause, and is not entitled to be heard therein.

Third exception. That said answer of the Oregon Railroad and Navigation Company does not state facts sufficient to constitute any cause of suit or ground of defense, or to entitle said Oregon Railroad and Navigation Company to any relief herein.

E. B. WATSON,
*Proctor for Respondent Anna Larson, Mother of John August Peterson, Deceased.*

Service by copy admitted at Portland, Or., July 31st, 1897.
W. W. COTTON,
*Proctor for Oregon Railroad and Nav. Co.*

(Endorsed:) Filed July 31, 1897. E. D. McKee, clerk.

And afterwards, to wit, on the 2d day of August, 1897, there was duly filed in said court exceptions of Balfour, Guthrie & Co. to answer of the Oregon Railroad and Navigation Company, in words and figures as follows, to wit:

In the District Court of the United States for the District of Oregon.

In the Matter of the Petition of the Oregon Railway and Navigation Company as the Owner of the Barge "Columbia" and the Oregon Short Line and Utah Northern Railway Company as Lessee Thereof.

926 *Exceptions of Balfour, Guthrie & Co. to Answer of Oregon Railroad and Navigation Company.*

Now come Robert Balfour, Stephen Williamson, Alexander Guthrie, Robert Brodie Forman, R. Bruce, and Walter J. Burns,

partners as Balfour, Guthrie & Co., and file and present these their exceptions to the answer of The Oregon Railroad and Navigation Company, claimant of the steamboat "Ocklahama," to the answer of the said Robert Balfour, Stephen Williamson, Alexander Guthrie, Robert Brodie Forman, R. Bruce, and Walter J. Burns to the libel and petition of the Oregon Railway and Navigation Company and the Oregon Short Line and Utah Northern Railway Company, said answer of the Oregon Railroad and Navigation Company having been heretofore filed herein. And for grounds of such exceptions, and as such exceptions, they except and allege as follows:

Except to the whole of said answer, for that the same is impertinent.

Except to all that portion of said answer which commences with the article or paragraph thereof designated and numbered "seventh," on page 4 thereof, and extends to the conclusion of said answer, for that the same is *res judicata*.

——— ———,
*Proctors for Balfour, Guthrie & Co.*

Due service of the within exceptions by certified copy, as prescribed by law, is hereby admitted at Portland, Oregon, Aug. 2, 1897.

COX, COTTON, TEAL & MINOR,
*Proctors for Claimant.*

(Endorsed:) Filed August 2, 1897. E. D. McKee, clerk.

927 And afterwards, to wit, on Monday, the 2d day of August, 1897, the same being the 25th judicial day of the regular July term of said court—present, the Honorable Charles B. Bellinger, United States district judge, presiding—the following proceedings were had in said case, to wit:

In the District Court of the United States for the District of Oregon.

In the Matter of the Petition of the Oregon Railway and Navigation Company as the Owner of the Barge "Columbia" and the Oregon Short Line and Utah Northern Railway Company as Lessee Thereof. No. 3163.

*Decree of August 2, 1897.*

AUGUST 2, 1897.

Now, at this day, this cause came on to be heard upon the several separate exceptions of the respondents Robert Balfour, Stephen Williamson, Alexander Guthrie, Robert Brodie Forman, R. Bruce, and Walter J. Burns, partners as Balfour, Guthrie & Company, and Malvina Short, administratrix of the estate of Marshal B. Short, deceased, and Sven Anderson, administrator of the estate of John August Peterson, deceased, and Anna C. Larson, to the several sepa-

rate answers of The Oregon Railroad and Navigation Company, the claimant herein, filed in answer to the several separate answers of the said Balfour, Guthrie & Company, Malvina Short, administratrix as aforesaid, Sven Anderson, administrator as aforesaid, and Anna C. Larsen, made to the libel and petition of the Oregon Railway and Navigation Company and the Oregon Short Line and Utah Northern Railway Company, the said Balfour, Guthrie & Company appearing by Mr. C. E. S. Wood, of their proctors, and the said Malvina Short, administratrix as aforesaid, and Sven Anderson, administrator as aforesaid and Anna C. Larsen, appearing by Mr. E. B. Watson, their proctor; and the said Oregon Railroad and Navigation Company appearing by Mr. W. W. Cotton, its proctor; upon consideration whereof, the court being fully advised in the premises:

928

It is ordered that the said several exceptions, and each of them, are hereby severally sustained.

And thereupon the court announced a rule that the said claimant, The Oregon Railroad and Navigation Company, would not be permitted to introduce evidence in support of its said several answers; and thereupon the said Oregon Railroad and Navigation Company announced that it did not desire to plead further. And upon the several motions of the said several respondents, thereupon made, for findings of fact upon the evidence already adduced, the court finds as follows:

That the respondents Balfour, Guthrie & Company have sustained damages in the sum of $16,018.79.

That the respondent Malvina Short, administratrix of the estate of Marshal B. Short, deceased, has sustained damages in the sum of $5,000.00.

That the respondent Sven Anderson, administrator of the estate of John August Peterson, deceased, has sustained damages in the sum of $3,000.00.

929

That the respondent Anna C. Larsen has not sustained any damage.

And it further appearing that the said steamboat "Ocklahama" was not surrendered for the benefit of the respondents in these proceedings as their several rights and equities might appear; and that in equity and good conscience said steamboat ought to have been surrendered as aforesaid; and that therefore, on the 28th day of May, 1896, said steamboat was seized and brought into these proceedings under the due and regular warrant of this court; and that thereafter, on the 30th day of September, 1896, a claim to said steamboat was duly filed by said claimant herein, The Oregon Railroad and Navigation Company, together with a stipulation in the sum of $200.00, to pay all costs awarded by this court or the appellate court against the said claimant, with J. G. Woodworth as surety upon such stipulation; and that afterwards, on the 22d day of October, 1895, said steamboat was duly appraised under the order of this court at the valuation of $8,600.00, and was thereafter released to said claimant, by order of this court, upon said claimant filing in this proceeding, on the 6th day of November, 1896, its stipulation

in the sum of $8,600.00. with H. W. Corbett and Henry Failing as sureties upon such stipulation. Now, therefore, it is ordered, adjudged, and decreed that the said respondents Balfour, Guthrie & Company, Malvina Short, administratrix of the estate of
930 Marshal B. Short, deceased, and Sven Anderson, administrator of the estate of John August Peterson, deceased, severally, and not jointly, have and recover out of the fund brought as aforesaid into the jurisdiction of this court in this proceeding the several respective sums as follows:

That the said Balfour, Guthrie & Company have and recover as aforesaid the sum of $16,018.79, without interest.

That the said Malvina Short, administratrix of the estate of Marshal B. Short, deceased, have and recover as aforesaid the sum of $5,000.00.

That the said Sven Anderson, administrator of the estate of John August Peterson, deceased, have and recover as aforesaid the sum of $3,000.00.

It is further ordered, adjudged, and decreed that the said Balfour, Guthrie & Company, and the said Malvina Short, administratrix as aforesaid, and the said Sven Anderson, administrator as aforesaid, also have and recover out of said fund, severally, and not jointly, their respective costs and disbursements, taxed and to be taxed, including such costs before any appeal, on appeal, and subsequent to the appeal heretofore had in this cause; and that they, and each of them, also have and recover, severally, and not jointly, against the Oregon Railroad and Navigation Company and its stipulation heretofore filed herein, and against J. G. Woodworth, surety upon such stipulation, their respective costs and disbursements in this proceeding, in the matter of the seizure of the said steamboat "Ocklahama" and the intervention of said Oregon Railroad and Navigation Company as claimant.

And it appearing to the court that the said fund in the
931 jurisdiction of the court, to wit, the said sum of $8,600.00, is not sufficient to satisfy the foregoing awards:

It is further ordered and decreed that said sum be distributed as follows:

First. To the payment of all costs and disbursements of the said Balfour, Guthrie & Company, including costs on appeal.

Second. The residue of said sum to be applied *pro rata* upon the several sums herein found and decreed to be due to the said Balfour, Guthrie & Company, Malvina Short, administratrix, and Sven Anderson, administrator, respectively.

It is further ordered and decreed that the said Oregon Railroad and Navigation Company, claimant herein, pay into the registry of this court, for distribution as aforesaid, the sum of $8,600.00; and that if, within ten days from the date of this decree, the said claimant has not paid in said sum as aforesaid, execution may issue against said claimant and the said stipulators on its said last-mentioned undertaking, to wit, H. W. Corbett and Henry Failing, or either of them, for the respective amounts herein severally awarded; and that execution issue against said Oregon Railroad and Naviga-

tion Company and J. G. Woodworth, stipulator, on said stipulation for costs, for the amount of costs covered by their said stipulation as aforesaid, if the same be not paid within ten days from the date of this decree.

And it is further ordered and decreed that upon the payment into court, or upon execution of said sum of $8,600.00, and
932 the payment of costs as aforesaid, the petition herein for a limitation of the liability of the petitioners be, and the same is hereby, allowed.

CHARLES B. BELLINGER, *Judge.*

(Endorsed:) Filed August 2, 1897. E. D. McKee, clerk.

And afterwards, to wit, on the 10th day of August, 1897, there was duly filed in said court a cost bill, in words and figures as follows, to wit:

In the District Court of the United States for the District of Oregon.

The Barge "Columbia;" Malvina Short, Adm'x; Balfour, Guthrie *et al.*, Respondents; The Oregon Railroad and Navigation Company, Claimant. No. 3163. No. 172. C. C. A.

*Cost Bill.*

Statement of disbursements claimed by Balfour, Guthrie & Co. in the above-entitled cause, viz:

| | |
|---|---|
| Clerk's fees | $49.40 |
| Marshal's fees | 35.32 |
| Costs in circuit court of appeals | 958.00 |
| Attorney's fees | 20.00 |
| Attorney's fee for taking depositions, at $2.50 each. | |
| 933 Depositions | |
| Examiner's fees | |
| Keeper's fees, in charge of "Ocklahama," June to Nov. 7, 1896 | 407.50 |
| Witness' fees and mileage, $102.45: official stenographer, trial, $169.00; marshal's fee, $10.65; witnesses' depositions, examiner'- fees, and stenographer's depositions, $80.54; attorney's fees for 9 depositions, at $2.50 each, $22.50; all accruing prior to appeal | 385.14 |
| Total taxed at | $1,855.36 |

E. D. McKEE, *Clerk,*
By G. H. MARSH, *Deputy.*

DISTRICT OF OREGON, *ss:*

I, C. E. S. Wood, being duly sworn, on my oath say that I am one of the attorneys for Balfour, Guthrie & Co. in the above-entitled cause; that the disbursements set forth herein have been actually and necessarily incurred in the prosecution of this suit, and that

said respondent is entitled to recover the same from the fund in court as I verily believe, and $— thereof from the Oregon Railroad and Navigation Co. as per decree.

C. E. S. WOOD.

Subscribed and sworn to before me this 10th day of August, 1897.

E. D. McKEE, *Clerk*,
By G. H. MARSH,
*Deputy Clerk.*

(Endorsed:) Filed August 10, 1897. E. D. McKee, clerk.

934 And afterwards, to wit, on the 11th day of October, 1897, there was duly filed in said court a petition of Oregon Railroad and Navigation Company to set aside decree of Aug. 2, 1897, in words and figures as follows, to wit:

In the Matter of the Petition of the Oregon Railway and Navigation Company as the Owners of the Barge "Columbia" and the Oregon Short Line and Utah Northern Railway Company as Lessee Thereof.

*Petition of Oregon Railroad and Navigation Company to Set Aside Decree.*

Now comes The Oregon Railroad and Navigation Company, the claimant of the steamboat the "Ocklahama," and respectfully shows to the court that on or about the second day of August, 1897, there was entered in this court a decree in favor of Robert Balfour and others, doing business as Balfour, Guthrie & Co., Malvina Short, and Sven Anderson, wherein it was ordered, adjudged, and decreed that the said persons above named recover against this claimant and the sureties upon the bond given by it the amounts mentioned in the said decree; that said decree recites, among other things, that the Oregon Railroad and Navigation Company appeared on the said second day of August and was heard upon the exceptions of the respondents to the answers of The Oregon Railroad and Navigation Company, claimant herein, and that said decree was entered as a result of said hearing.

Your petitioner further shows that the matter of said ex-
935 ceptions was never set down for hearing and that there was no hearing upon said exceptions to the amended answers of this complainant on the said second day of August or at any other time; that neither your petitioner nor its counsel were notified of any such hearing and was not present thereat. Your petitioner further shows that there was never submitted to it or its counsel any draft of the said decree; that your petitioner had no opportunity to examine the same before it was entered or to be heard upon the form thereof. Your petitioner further represents that it had no actual notice of said decree until the fourth day of October, 1897.

Wherefore your petitioner moves that the said decree may be vacated and set aside, and that your petitioner may be heard upon the matter of the exceptions of the respondents, and of each of them, to the answers filed by your petitioner, and that such further proceedings may be had as the rules and practice of this court may require, and that your petitioner may be afforded such further relief in the premises as may be just and equitable.

THE OREGON RAILROAD AND NAVIGATION CO.,
By W. W. COTTON, *General Attorney.*

STATE OF OREGON,
*County of Multnomah,* } ss:

I, W. W. Cotton, being first duly sworn, depose and say that I am the secretary of the Oregon Railroad and Navigation
936 Company, and also its attorney in the above-entitled proceeding; that I have read the foregoing petition and have personal knowledge of the facts therein stated, and the same is true as I verily believe.

W. W. COTTON.

Subscribed and sworn to before me this 9th day of October, 1897.

[SEAL.]

JOSEPH N. TEAL,
*Notary Public in and for Oregon.*

Service by copy admitted at Portland, Ore., Oct. 9, 1897.

WILLIAMS, WOOD & LINTHICUM,
*Proctors for Balfour, Guthrie & Co.*
WATSON & BEEKMAN,
*Proctors for Malvina Short, Sven Anderson, and Anna C. Larson.*

(Endorsed:) Filed October 11, 1897. E. D. McKee, clerk.

And afterwards, to wit, on the 11th day of October, 1897, there was duly filed in said court a notice to set — petition to set aside decree for hearing, in words and figures as follows, to wit:

In the District Court of the United States for the District of Oregon.

In the Matter of the Petition of the Oregon Railway and Navigation Company as the Owners of the Barge "Columbia" and the Oregon Short Line and Utah Northern Railway Company as Lessees Thereof.

937 *Notice to Set for Hearing Petition to Set Aside Decree.*

To Robert Balfour, Stephen Williamson, Alexander Guthrie, Robert Brodie Forman, R. Bruce, and Walter J. Burns, partners as Balfour, Guthrie & Co., and Williams, Wood & Linthicum, their proctors; Malvina Short, administratrix of the estate of Marshal B. Short, deceased; Sven Anderson, administrator of the estate of John August Peterson, deceased, and Anna C. Larson, and E. B. Watson, their proctor:

You, and each of you, will please take notice that the Oregon Railroad and Navigation Company will bring on for hearing, on the 16th day of October, 1897, at the opening of court on said day, or as soon thereafter as counsel can be heard, its petition and motion to vacate and set aside the decree entered herein on August 2, 1897, and that said petition and motion will be heard upon the said petition and motion in the records and files of the court in this cause.

COX, COTTON, TEAL & MINOR,
*Proctors for the Oregon Railroad and Navigation Company.*

Service by copy admitted at Portland, Ore., Oct. 9, 1897.
WILLIAMS, WOOD & LINTHICUM,
*Proctors for Balfour, Guthrie & Co.*
WATSON & BEEKMAN,
*Proctors for Malvina Short, Sven Anderson, and Anna C. Larson.*

(Endorsed:) Filed October 11, 1897. E. D. McKee, clerk.

938 And afterwards, to wit, on the 29th day of October, 1897, there was duly filed in said court an answer of Balfour, Guthrie & Co. to petition of the Oregon Railroad & Navigation Co. to set aside decree, in words and figures as follows, to wit:

In the District Court of the United States for the District of Oregon.

In the Matter of the Petition of the Oregon Railway and Navigation Company as the Owner of the Barge "Columbia" and the Oregon Short Line and Utah Northern Railway Company as Lessee Thereof.

*Answer of Balfour, Guthrie & Co. to Petition to Set Aside Decree.*

Now come Robert Balfour, Stephen Williamson, Alexander Guthrie, Robert B. Forman, and Walter J. Burns, partners, doing

business as Balfour, Guthrie & Co., and for answer to the petition heretofore filed herein of the Oregon Railroad and Navigation Company, praying that the decree entered herein on or about the 2d day of August, 1897, be vacated and set aside, etc., respectfully allege and show to the court as follows:

The exceptions of the respondents herein to the answer of The Oregon Railroad and Navigation Company, claimant herein,
939 were duly heard and argued in open court, W. W. Cotton, Esq., appearing as counsel for the Oregon Railroad and Navigation Company, and said exceptions were thereupon sustained by the court. At that time said Cotton, as counsel as aforesaid, stated that he desired to file amended answers for his clients, but did not care to argue the matter further; and that exceptions to such answers, to be thereafter filed by him, might be considered as having been at this time argued and sustained. A draft of a proposed decree, to be entered in the event of said exceptions being sustained, had been transmitted to said counsel for the Oregon Railroad and Navigation Company prior to said argument, and had been returned by him to counsel for the said Balfour, Guthrie & Co., with certain suggestions relative to the form and substance thereof; and a fair copy of a second draft of such proposed decree, embodying said suggestions of counsel, was thereafter prepared and submitted to him, at the time of the argument aforesaid, and was read by him; and he thereupon made the additional suggestion that he wanted it to appear not only that exceptions had been sustained, but also that he had offered to support his answer by testimony, and that the court had made a rule declining to permit him to do so. This additional statement, so requested or suggested by him, was thereupon inserted in said draft; and said draft, as so altered, was thereupon submitted to said counsel, and was by him at said time approved; and the decree, as entered, is a copy of said draft, as so altered and approved, without any modification whatever.

These respondents therefore deny that said claimant, The
940 Oregon Railroad and Navigation Company, has not been heard upon the said exceptions to its amended answer; and deny that it or its counsel has had no opportunity to examine the draft of said decree before the same was entered.

Wherefore, these respondents pray that said petition be denied.

WILLIAMS, WOOD & LINTHICUM,
*Proctors for Balfour, Guthrie & Co., Respondents.*

STATE OF OREGON, } ss.:
*County of Multnomah,* }

I, Walter J. Burns, being first duly sworn, say on oath that I am a member of the partnership firm of Balfour, Guthrie & Co., and one of the persons named in and making the foregoing answer; and that said answer is true, as I verily believe.

WALTER J. BURNS.

Subscribed and sworn to before me this 28th day of October, 1897.

[NOTARY'S SEAL.] F. D. CHAMBERLAIN,
*Notary Public in and for Oregon.*

Due service of the within answer by certified copy, as prescribed by law, is hereby admitted, at Portland, Oregon, October 28, 1897.

L. B. COX,
*Proctor for Oregon R. R. & Navigation Co.*

(Endorsed:) Filed October 29, 1897. E. D. McKee, clerk.

941 And afterwards, to wit, on Monday, the 20th day of December, 1897, the same being the 43d judicial day of the regular November term of said court—present, Honorable Charles B. Bellinger, United States district judge, presiding—the following proceedings were had in said case, to wit:

In the District Court of the United States for the District of Oregon.

In the Matter of the Petition of the Oregon Railway and Navigation Company as the Owners of the Barge "Columbia" and the Oregon Short Line and Utah Northern Railway Company as Lessee Thereof. No. 3163.

*Decree of December* 20, 1897.

DEC. 20, 1897.

Now, at this day, this cause comes on to be heard upon the motion of the Oregon Railroad and Navigation Company, for a rehearing of this cause upon the exceptions of the several respondents to the several answers of said Oregon Railroad and Navigation Company, and upon the pleadings and proofs; said Oregon Railroad and Navigation Company appearing by Mr. W. W. Cotton, of counsel, and the respondents Balfour, Guthrie & Company by Mr. J. C. Flanders, of counsel, and the respondents Malvina Short, Sven Anderson, and Anna C. Larson, by Mr. E. B.
942 Watson, of counsel. Whereupon, it is ordered that said motion be, and the same is hereby, allowed; and thereupon this cause comes on for rehearing on said exceptions and on said pleadings and proofs, and the court being fully advised in the premises, it is ordered and adjudged that the order on said exceptions and the final decree, entered in this cause on August 2, 1897, be, and the same are hereby, vacated and set aside. Whereupon, on further consideration of the premises, it is ordered, adjudged, and decreed that the several separate exceptions of the respondents Robert Balfour, Stephen Williamson, Alexander Guthrie, Robert Brodie Forman, R. Bruce, and Walter J. Burns, partners as Balfour, Guthrie & Co., and Malvina Short, administratrix of the estate of Marshal B. Short, deceased, and Sven Anderson, administrator of the estate of John August Peterson, deceased, and Anna C. Lar-

son, to the several separate answers of The Oregon Railroad and Navigation Company, the claimant herein, filed in answer to the several separate answers of said Balfour, Guthrie and Company, Malvina Short, administratrix, as aforesaid, Sven Anderson, administrator as aforesaid, and Anna C. Larson, made to the libel and petition of the Oregon Railway and Navigation Company, and the Oregon Short Line and Utah Northern Railway Company, be, and each of them is hereby, sustained.

And thereupon, the court announces the rule that the said claimant, The Oregon Railroad and Navigation Company, would not be permitted to introduce evidence in support of its said several answers; and thereupon the said Oregon Railroad & Navigation Company announced that it did not desire to plead further. And upon the several motions of the said several respondents, thereupon made, for findings of fact upon the evidence already adduced, the court finds as follows:

943

That the respondents Balfour, Guthrie and Company, have sustained damages in the sum of $16,018.79.

That the respondents Malvina Short, administratrix of the estate of Marshal B. Short, deceased, has sustained damages in the sum of $5,000.00.

That the respondent Sven Anderson, administrator of the estate of John August Peterson, deceased, has sustained damages in the sum of $3,000.00.

That the respondent Anna C. Larson has not sustained any damage.

And it further appearing that the steamboat "Ocklahama" was not surrendered for the benefit of the respondents in these proceedings as their several rights and equities might appear; and that in equity and good conscience said steamboat ought to have been surrendered as aforesaid; and that, therefore, on the 28th day of May, 1896, said steamboat was seized and brought into these proceedings under the due and regular warrant of this court; and that thereafter, on the 30th day of September, 1896, a claim to said steamboat was duly filed by said claimant herein, The Oregon Railroad and Navigation Company, together with a stipulation in the sum of $200.00 to pay all costs awarded by this court or the appellate court against the said claimant, with J. G. Woodworth as surety upon such stipulation; and that afterwards, on the 22d day of October, 1896, said steamboat was duly appraised under the order of this court at the valuation of $8,600.00, and was thereupon released to said claimant by order of this court upon said claimant filing in this proceeding, on the 6th day of November, 1896, its stipulation in the sum of $8,600.00, with H. W. Corbett and Henry Failing as sureties upon such stipulation:

944

Now, therefore, it is ordered, adjudged, and decreed that the said respondents Balfour, Guthrie and Company; Malvina Short, administratrix of the estate of Marshal B. Short, deceased, and Sven Anderson, administrator of the estate of John August Peterson, deceased, severally, and not jointly, have and recover out of the fund

brought as aforesaid into the jurisdiction of this court in this proceeding the several respective sums, as follows:

That the said Balfour, Guthrie and Company have and recover as aforesaid the sum of $16,018.79 without interest.

That the said Malvina Short, administratrix of the estate of Marshal B. Short, deceased, have and recover as aforesaid the sum of $5,000.00.

That the said Sven Anderson, administrator of the estate of John August Peterson, deceased, have and recover as aforesaid the sum of $3,000.00.

It is further ordered, adjudged, and decreed that the said Balfour, Guthrie and Company, and the said Malvina Short, administratrix as aforesaid, and the said Sven Anderson, administrator as aforesaid, also have and recover out of said fund, severally, and not jointly, their respective costs and disbursements taxed and to be taxed, including such costs before any appeal on appeal and subsequent to appeal heretofore had in this cause; that they, and each of
945 them, also have and recover, severally, and not jointly, against the Oregon Railroad and Navigation Company, and its stipulation heretofore filed herein, and against J. G. Woodworth, surety upon such stipulation, their respective costs and disbursements in this proceeding, in the matter of the seizure of the said steamboat "Ocklahama" and the intervention of the said Oregon Railroad and Navigation Company, as claimant.

And it appearing to the court that the said fund in the jurisdiction of the court, to wit, the said sum of $8,600.00, is not sufficient to satisfy the foregoing awards.

It is further ordered and decreed that said sum be distributed as follows:

First. To the payment of all costs and disbursements of the said Balfour, Guthrie and Company, including costs on appeal.

Second. The residue of said sum to be applied, *pro rata*, upon the several sums herein found and decreed to be due to the said Balfour, Guthrie and Company, Malvina Short, administratrix, and Sven Anderson, administrator, respectively.

It is further ordered and decreed that the said Oregon Railroad and Navigation Company, claimant herein, pay into the registry of this court, for distribution as aforesaid, the sum of $8,600.00; and that if, within ten days from the date of this decree, the said claimant has not paid in said sum as aforesaid, execution may issue against said claimant and said stipulators on its said last-mentioned undertaking, to wit, H. W. Corbett and Henry Failing, or
946 either of them, for the respective amounts herein severally awarded; and that execution issue against said Oregon Railroad and Navigation Company and J. G. Woodworth, stipulator, on said stipulation for costs, for the amount of costs covered by their said stipulation as aforesaid, if the same be not paid within ten days from the date of this decree.

And it is further ordered and decreed that upon the payment into court or upon execution of said sum of $8,600.00, and the pay-

ment of costs as aforesaid, the petition herein for a limitation of the liability of the petitioners be, and the same is hereby, allowed.

CHARLES B. BELLINGER, *Judge.*

(Endorsed:) Filed December 20, 1897. E. D. McKee, clerk.

947 And afterwards, to wit, on the 6th day of January, 1898, there was duly filed in said court a petition of the Oregon Railway and Navigation Company for appeal from decree of December 20, 1897, in words and figures as follows, to wit:

In the District Court of the United States for the District of Oregon.

In the Matter of the Petition of the Oregon Railway and Navigation Company as the Owner of the Barge "Columbia" and the Oregon Short Line and Utah Northern Railway Company as Lessee Thereof to Limit Liability for Damage Done by the said Barge "Columbia."

*Petition of Oregon Railway and Navigation Company for Appeal from Decree of December 20, 1897.*

The Oregon Railway and Navigation Company conceives itself aggrieved by the decree entered in the above-entitled proceeding on the 20th day of December, 1897, upon the vacation and setting aside of the decree entered in the above entitled proceeding on August 2, 1897, both of said decrees being in favor of Robert Balfour, Stephen Williamson, Alexander Guthrie, Robert Brodie Forman, R. Bruce, and Walter J. Burns, partners as Balfour, Guthrie & Co., and in favor of Malvina Short, administratrix of the estate of Marshal B. Short, deceased, and Sven Anderson, administrator of the estate of John August Peterson, deceased, and ordering and decreeing that the Oregon Railroad and Navigation Company pay into the registry of the above-entitled court for distribution as provided in said decree, the sum of eighty-six hundred dollars ($8,600.00), and for costs as provided in said decree, and doth hereby appeal from the said decree to the United States circuit court of appeals for the ninth circuit, and prays that this its appeal may be allowed, and that a transcript of the record and proceedings and papers upon which said decree was made, duly authenticated, may be sent to the United States circuit court of appeals for the ninth circuit.

948

COX, COTTON, TEAL & MINOR,
*Proctors for the Petitioner and Appellant, The Oregon Railway and Navigation Company.*

(Endorsed:) Filed January 6, 1898. E. D. McKee, clerk.

949 And afterwards, to wit, on Thursday, the 6th day of January, 1898, the same being the 58th judicial day of the regular November term of said court—present, the Honorable Charles B. Bellinger, United States district judge, presiding—the following proceedings were had in said case, to wit:

In the District Court of the United States for the District of Oregon.

In the Matter of the Petition of the Oregon Railway and Navigation Company as the Owner of the Barge "Columbia" and the Oregon Short Line and Utah Northern Railway Company as Lessee Thereof to Limit Liability for Damage Done by the said Barge "Columbia." No. 3163.

*Order Allowing Appeal from Decree of December* 20, 1897, *and Fixing Amount of Bond.*

Now, on this day, comes the Oregon Railway and Navigation Company, by W. W. Cotton, of counsel, and presents to the court its petition praying for an order allowing an appeal by it to the United States circuit court of appeals for the ninth circuit from the decree heretofore entered in this cause on December 20, 1897, upon the vacation and setting aside of the decree heretofore entered herein on August 2, 1897, and moves the court to fix the amount of the cost bond to be given by it on such appeal.

950 Whereupon, it is ordered that the prayer of the said petition be granted, and the said Oregon Railway and Navigation Company be, and it is hereby allowed, to take the appeal as prayed for therein, upon giving a bond for costs on such appeal, with sureties to be approved by the judge making this order in the sum of five hundred dollars.

Done in open court, January 6, 1898.

CHARLES B. BELLINGER, *Judge.*

(Endorsed:) Filed January 6, 1898. E. D. McKee, clerk.

And afterwards, to wit, on the 7th day of January, 1898, there was duly filed in said court an assignment of errors on appeal of the Oregon Railway and Navigation Company from decree of December 20, 1897, in words and figures as follows, to wit:

In the District Court of the United States for the District of Oregon.

In the Matter of the Petition of the Oregon Railway and Navigation Company as the Owner of the Barge "Columbia" and the Oregon Short Line and Utah Northern Railway Company as Lessee Thereof to Limit Liability for Damage Done by the said Barge "Columbia."

951 *Assignment of Errors on Appeal from Decree of December* 20, 1897.

Comes now the Oregon Railway and Navigation Company, and makes this its assignment of errors on appeal, taken by it in the above-entitled proceeding from the decree entered by the district court of the United States for the district of Oregon, and states that error was committed by the said court in the making of said decree

and in the proceedings prior thereto, in the following matters, to wit:

First. That under the mandate of the United States circuit court of appeals the district court had no jurisdiction to enter any personal judgment or decree, except for the costs of said proceeding against the appellant.

Second. That the said district court had no jurisdiction to enter any decree under the said mandate imposing any liability upon this appellant or the steamer "Ocklahama."

Third. The district court erred in ordering and decreeing the payment into court of the value of the steamer, "Ocklahama," or the delivering to trustees of said steamer, or of any interest in said steamer, as a condition to the right of this appellant to limit its liability in respect of the matters and things alleged in the petition of this appellant initiating this proceeding, and filed on the 29th day of November, 1892.

Fourth. The district court erred in entering the decree appealed from for the reason that said decree is not in accordance with
952 the opinion of the United States circuit court of appeals of this proceeding on the former appeal, and is inconsistent therewith.

Fifth. The district court erred in seizing the steamer "Ocklahama," and in making the decree appealed from, for the reason that the seizure of the said "Ocklahama" was not required by the mandate of the United States circuit court of appeals, and was contrary to the said mandate, and the district court was without power or authority in this cause to issue process against the "Ocklahama" or to cause the "Ocklahama" to be seized.

Sixth. The district court erred in seizing the "Ocklahama" and in making said decree for the reason that no libel *in rem* had, or has ever been, filed in this proceeding against the "Ocklahama."

Seventh. The district court erred in seizing the "Ocklahama" and in entering the decree herein appealed from, for the reason that this proceeding was commenced by the Oregon Railway and Navigation Company and the Oregon Short Line and Utah Northern Railway Company to limit their personal liability, and was a suit *in personam*, and that the seizure of the said "Ocklahama" and the decree entered herein changed the said proceeding *in personam* arising out of the collision into a proceeding *in rem*, and is contrary to the admiralty rules and practice of the Supreme Court of the United States.

Eighth. The district court erred in finding that Malvina Short, administratrix of the estate of Marshal B. Short, deceased, had sustained damage in the sum of five thousand dollars ($5,000) and in decreeing that said Malvina Short, as such administratrix, should have and recover said sum, or a portion thereof, from The
953 Oregon Railroad and Navigation Company, claimant of the "Ocklahama," for the reason that it appears by the evidence and the findings of fact made by the district court on a former trial, and from the opinion of the United States circuit court of appeals

in this cause, that any and all injuries received by the said Marshal B. Short were the result of his own contributory negligence.

Ninth. The district court erred in decreeing that Malvina Short, administratrix of the estate of Marshal B. Short, deceased, should have and recover the sum of $5,000, and in decreeing that the same, or any portion of the same, should be paid out of the fund represented by the bond given by The Oregon Railroad and Navigation Company, the claimant of the steamer "Ocklahama," for the reason that it appears from the evidence and the findings of fact, and from the opinion of the United States circuit court of appeals, that any and all injuries received by the said Marshal B. Short were the result of his own negligence, or that of his fellow-servants, and without any negligence on the part of this appellant, or the Oregon Short Line and Utah Northern Railway Company.

Tenth. The district court erred in decreeing that Sven Anderson, administrator of the estate of John August Peterson, should have and recover the sum of three thousand dollars ($3,000), and decreeing that the same, or any part of the same, should be paid out of the fund represented by the bond given by The Oregon Railroad and Navigation Company, the claimant of the "Ocklahama," for
the reason that it appears by the evidence and findings of
954 fact and the opinion of the United States circuit court of appeals that any and all injuries received by the said John August Peterson were received as the result of negligence of his fellow-servants, and without any negligence on the part of this appellant or the Oregon Short Line and Utah Northern Railway Company.

Eleventh. The district court erred in decreeing that Robert Balfour and others, doing business as partners under the name of Balfour, Guthrie & Co., Malvina Short, administratrix of the estate of Marshal B. Short, deceased, and Sven Anderson, administrator of the estate of John August Peterson, deceased, or either of them, should have and recover any sum whatsoever against this appellant, for the reason that it appears from the evidence and findings of fact that appellant, Oregon Railway and Navigation Company, had long prior to the date of the alleged injuries to said persons, or any of them, duly leased to the Oregon Short Line and Utah Northern Railway Company the said barge "Columbia" and the said steamer "Ocklahama," and that the same, and each of them, were exclusively and solely operated at the time of the said injuries by the Oregon Short Line and Utah Northern Railway Company, and this appellant had no interest of any kind whatsoever in the said operation, and had made no contract for the carriage of the wheat belonging to the said Robert Balfour and others, and had not in its employ the said Marshal B. Short or the said John August Peterson, and was not liable for any reason to the said persons, or either of them, for any of the injuries received by them or either of them.

Twelfth. The district court erred in decreeing that the
955 steamer "Ocklahama," or her value, should be surrendered in order that this appellant might limit its liability to the said Robert Balfour and others and to the said Malvina Short,

administratrix as aforesaid, and the said Sven Anderson, administrator as aforesaid, for the reason that there is no evidence showing that the towage services of the steamtug "Ocklahama" were not fully performed when the said barge "Columbia" was placed alongside of the dock at Astoria, but, on the contrary, the evidence shows that said services of the said "Ocklahama" were at the time of the alleged injuries to said persons, and each of them, fully performed.

Thirteenth. The district court erred in seizing the said steamer "Ocklahama" in this proceeding, or in decreeing that the steamer "Ocklahama" or her value should be surrendered in order that this appellant might limit its liability for the damages caused or done by the said steamer "Ocklahama."

Fourteenth. The district court erred in seizing the said "Ocklahama," and in decreeing that the said "Ocklahama" or her value should be surrendered in this proceeding, for the reason that if this appellant or the Oregon Short Line and Utah Northern Railway Company, or both of them, were not entitled by reason of the filing of the petition initiating this proceeding, and by reason of the payment into court of the appraised value of the barge "Columbia," and the matters and things done by the petitioners to limit its and their liability to the said Robert Balfour and others, and to the estates of Marshal B. Short and John August Peterson, then and in that event it was the duty of the district court, under the said mandate and under the rules and practice in such cases
956 made and provided, to have dismissed this proceeding and have allowed the said Robert Balfour and others, and the administratrix of the estate of Marshal B. Short and the administrator of the estate of John August Peterson, to have taken such remedy as they, or either of them, might have been advised against this appellant or the Oregon Short Line and Utah Northern Railway Company, or to have confined the relief granted to the said Robert Balfour and others, and the said administratrix and administrator, to personal decrees and judgments against this appellant or the Oregon Short Line and Utah Northern Railway Company, or both, as the court might have been advised under the evidence and findings of fact.

Fifteenth. The district court erred in decreeing that the steamer "Ocklahama" should be seized, or the said steamer or her value surrendered in this proceeding, for the reason that the mandate of the United States circuit court of appeals did not justify or order any such relief to be afforded or given, but that such relief is improper under the practice in proceedings of this character.

W. W. COTTON,
*Proctor for the Appellant The Oregon Railway and Navigation Company.*

Due service by copy accepted.

C. E. S. WOOD,
*Proctor for Balfour, Guthrie & Co.*

(Endorsed:) Filed January 7, 1898. E. D. McKee, clerk.

957 And afterwards, to wit, on the 7th day of January, 1898, there was duly filed in said court a bond on appeal of Oregon Railway and Navigation Company from decree of December 20, 1897, in words and figures as follows, to wit:

In the District Court of the United States for the District of Oregon.

In the Matter of the Petition of the Oregon Railway and Navigation Company as the Owner of the Barge "Columbia" and the Oregon Short Line and Utah Northern Railway Company as Lessee Thereof to Limit Liability for Damage Done by the said Barge "Columbia."

*Bond on Appeal of Oregon Railway and Navigation Company from Decree of December* 20, 1897.

Know all men by these presents, that we, the Oregon Railway and Navigation Company, and Henry Failing, are held and firmly bound unto Robert Balfour, Stephen Williamson, Alexander Guthrie, Robert Brodie Forman, R. Bruce, and Walter J. Burns, partners as Balfour, Guthrie & Co., and Malvina Short, administratrix of the estate of Marshal B. Short, deceased, and Sven Anderson, administrator of the estate of John August Peterson, deceased, in the sum of five hundred dollars ($500) to be paid to the said Robert Balfour, Stephen Williamson, Alexander Guthrie, Robert Brodie Forman, R. Bruce, and Walter J. Burns, partners as Balfour,
958 Guthrie & Co., and Malvinia Short, administratrix of estate of Marshal B. Short, deceased, and Sven Anderson, administrator of the estate of John August Peterson, deceased, for the payment of which, well and truly to be made, we bind ourselves and each of us, and our and each of our heirs, executors, administrators, successors, and assigns, jointly and severally, firmly by these presents.

Signed with our seal- and dated this 6th day of January, 1898.

Whereas, the above-named, The Oregon Railway and Navigation Company, prosecuted an appeal to the United States circuit court of appeals for the ninth circuit to reverse the decree rendered in the above entitled proceeding by the district court of the United States, for the district of Oregon, in favor of the said Robert Balfour, Stephen Williamson, Alexander Guthrie, Robert Brodie Forman, R. Bruce, and Walter J. Burns, partners as Balfour, Guthrie & Co., and Malvina Short, administratrix of the estate of Marshal B. Short, deceased, and Sven Anderson, administrator of the estate of John August Peterson, deceased:

Now, therefore, the condition of this obligation is such that if the above-named, the said Oregon Railway and Navigation Company shall prosecute said appeal to effect, and answer all costs, if it shall fail to make said appeal good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

THE OREGON RAILWAY AND NAVIGATION COMPANY,
By W. W. COTTON, *Its Attorney.* [SEAL.]
HENRY FAILING. [SEAL.]

959 STATE OF OREGON, } ss:
*County of Multnomah,* }

I, Henry Failing, being first duly sworn, depose and say that I am a resident and householder within the district of Oregon, and am worth the sum of one thousand dollars ($1,000) over and above my just debts and liabilities, exclusive of property exempt from execution.

HENRY FAILING.

Subscribed and sworn to before me this 6th day of January, 1898.
[SEAL.] W. C. BRISTOL,
*Notary Public in and for Oregon.*

The above bond and surety thereto is hereby approved this 7th day of January, 1898.

CHARLES B. BELLINGER, *Judge.*

(Endorsed:) Filed January 7, 1898. E. D. McKee, clerk.

960 And, to wit, on the 6th day of January, 1898, there was duly filed in said court a petition of the Oregon Short Line and Utah Northern Company for an appeal from decree of December 20, 1897, in words and figures as follows, to wit:

In the District Court of the United States for the District of Oregon.

In the Matter of the Petition of the Oregon Railway and Navigation Company as the Owner of the Barge "Columbia" and the Oregon Short Line and Utah Northern Railway Company as Lessee Thereof to Limit Liability for Damage Done by the said Barge "Columbia."

*Petition of Oregon Short Line and Utah Northern Railway Company for Appeal from Decree of December* 20, 1897.

The Oregon Short Line and Utah Northern Railway Company conceives itself aggrieved by the decree entered in the above-entitled proceeding on the 20th day of December, 1897, upon the vacation and setting aside of the decree entered in the above-entitled proceeding on August 2, 1897, both of said decrees being in favor of Robert Balfour, Stephen Williamson, Alexander Guthrie, Robert Brodie Forman, R. Bruce, and Walter J. Burns, partners as Balfour, Guthrie & Co., and in favor of Malvina Short, administratrix of the estate of Marshal B. Short, deceased, and Sven Anderson,
961 administrator of the estate of John August Peterson, deceased, and ordering and decreeing that the Oregon Railroad and Navigation Company pay into the registry of the above-entitled court, for distribution as provided in said decree, the sum of eighty-six hundred dollars ($8,600.00), and for costs as provided in said decree, and doth hereby appeal from the said decree to the United States circuit court of appeals for the ninth circuit, and

prays that this its appeal may be allowed, and that a transcript of the record and proceedings and papers upon which said decree was made, duly authenticated, may be sent to the United States circuit court of appeals for the ninth circuit.

COX, COTTON, TEAL & MINOR,
*Proctors for the Petitioner and Appellant The Oregon Short Line and Utah Northern Railway Company.*

(Endorsed:) Filed January 6, 1898. E. D. McKee, clerk.

962 And afterwards, to wit, on Thursday, the 6th day of January, 1898, the same being the 58th judicial day of the regular November term of said court—present, the Honorable Charles B. Bellinger, United States district judge, presiding—the following proceedings were had in said case, to wit:

In the District Court of the United States for the District of Oregon.

In the Matter of the Petition of the Oregon Railway and Navigation Company as the Owner of the Barge "Columbia" and the Oregon Short Line and Utah Northern Railway Company as Lessee Thereof to Limit Liability for Damage Done by the said Barge "Columbia." No. 3163.

*Order Allowing Oregon Short Line and Utah Northern Railway Company Appeal from Decree of December* 20, 1897.

Now, on this day, comes the Oregon Short Line and Utah Northern Railway Company, by W. W. Cotton, of counsel, and presents to the court its petition praying for an order allowing an appeal by it to the United States circuit court of appeals for the ninth circuit from the decree heretofore entered in this cause on December 20, 1897, upon the vacation and setting aside of the decree hereto-
963 fore entered herein on August 2, 1897, and moves the court to fix the amount of the cost bond to be given by it on such appeal.

Whereupon, it is ordered that the prayer of the said petition be granted, and the said Oregon Short Line and Utah Northern Railway Company be, and it is hereby, allowed to take the appeal as prayed for therein, upon giving a bond for costs on such appeal, with sureties to be approved by the judge making this order, in the sum of five hundred dollars.

Done in open court, January 6, 1898.

CHARLES B. BELLINGER, *Judge.*

(Endorsed:) Filed January 6, 1898. E. D. McKee, clerk.

And afterwards, to wit, on the 7th day of January, 1898, there was duly filed in said court an assignment of errors on appeal of the Oregon Short Line and Utah Northern Railway Company from decree of December 20, 1897, in words and figures as follows, to wit:

In the District Court of the United States for the District of Oregon.

In the Matter of the Petition of the Oregon Railway and Navigation Company as the Owner of the Barge "Columbia" and the Oregon Short Line and Utah Northern Railway Company as Lessee Thereof to Limit Liability for Damage Done by the said Barge "Columbia."

964 *Assignment of Errors on Appeal of Oregon Short Line and Utah Northern Railway Company from Decree of December* 20, 1897.

Comes now the Oregon Short Line and Utah Northern Railway Company and makes this its assignment of errors on the appeal, taken by it in the above-entitled proceeding from the decree entered by the district court of the United States for the district of Oregon, and states that error was committed by the said court in the making of said decree, and in the proceedings prior thereto, in the following matters, to wit:

First. That under the mandate of the United States circuit court of appeals, the district court had no jurisdiction to enter any personal judgment or decree except for the costs of said proceeding against the appellant.

Second. That the said district court had no jurisdiction to enter any decree under the said mandate imposing any liability upon this appellant or the steamer "Ocklahama."

Third. The district court erred in ordering and decreeing the payment into court of the value of steamer "Ocklahama," or the delivering to trustees of said steamer, or of any interest in said steamer as a condition to the right of this appellant to limit its liability in respect of the matters and things alleged in the petition of this appellant initiating this proceeding and filed on the 29th day of November, 1892.

Fourth. The district court erred in entering the decree appealed from for the reason that said decree is not in accordance with
965 the opinion of the United States circuit court of appeals of this proceeding on the former appeal, and is inconsistent therewith.

Fifth. The district court erred in seizing the steamer "Ocklahama," and in making the decree appealed from, for the reason that the seizure of the said "Ocklahama" was not required by the mandate of the United States circuit court of appeals, and was contrary to the said mandate, and the said district court was without power or authority in this cause to issue process against the "Ocklahama" or to cause the "Ocklahama" to be seized.

Sixth. The district court erred in seizing the "Ocklahama," and in making said decree, for the reason that no libel *in rem* had, or has ever been, filed in this proceeding against the "Ocklahama."

Seventh. The district court erred in seizing the "Ocklahama," and in entering the decree herein appealed from, for the reason that this proceeding was commenced by the Oregon Railway and Navi-

gation Company and the Oregon Short Line and Utah Northern Railway Company to limit their personal liability, and was a suit *in personam*, and that the seizure of the said "Ocklahama" and the decree entered herein changed the said proceeding *in personam* arising out of the collision into a proceeding *in rem*, and is contrary to the admiralty rules and practice of the Supreme Court of the United States.

Eighth. The district court erred in finding that Malvina Short, administratrix of the estate of Marshal B. Short, deceased, had sustained damage in the sum of five thousand dollars ($5,000), and in decreeing that said Malvina Short, as such administratrix, should have and recover said sum, or a portion thereof, from The
966 Oregon Railroad and Navigation Company, the claimant of the "Ocklahama," for the reason that it appears by the evidence and the findings of fact made by the district court on a former trial, and from the opinion of the United States circuit court of appeals in this cause, that any and all injuries received by the said Marshal B. Short were the result of his own contributory negligence.

Ninth. The district court erred in decreeing that Malvina Short, administratrix of the estate of Marshal B. Short, deceased, should have and recover the sum of $5,000, and in decreeing that the same, or any portion of the same, should be paid out of the fund represented by the bond given by The Oregon Railroad and Navigation Company, the claimant of the steamer "Ocklahama," for the reason that it appears from the evidence and the findings of fact, and from the opinion of the United States circuit court of appeals, that any and all injuries received by the said Marshal B. Short were the result of his own negligence, or that of his fellow-servants, and without any negligence on the part of this appellant, or the Oregon Railway and Navigation Company.

Tenth. The district court erred in decreeing that Sven Anderson, administrator of the estate of John August Peterson, should have and recover the sum of three thousand dollars ($3,000), and decreeing that the same, or any part of the same, should be paid out of the fund represented by the bond given by The Oregon Railroad and Navigation Company, the claimant of the "Ocklahama," for the reason that it appears by the evidence and findings of fact, and the opinion of the United States circuit court of appeals, that any
967 and all injuries received by the said John August Peterson were received as the result of negligence of his fellow-servants, and without any negligence on the part of this appellant or the Oregon Railway and Navigation Company.

Eleventh. The district court erred in decreeing that the steamer "Ocklahama," or her value, should be surrendered in order that this appellant might limit its liability to the said Robert Balfour and others, and to the said Malvina Short, administratrix as aforesaid, and the said Sven Anderson, administrator as aforesaid, for the reason that there is no evidence showing that the towage services of the steamtug "Ocklahama" were not fully performed when the said barge "Columbia" was placed alongside of the dock at Astoria, but, on the contrary, the evidence shows that said serv-

ices of the said "Ocklahama" were at the time of the alleged injuries to said persons, and each of them, fully performed.

Twelfth. The district court erred in seizing the said steamer "Ocklahama" in this proceeding, or in decreeing that the steamer "Ocklahama," or her value, should be surrendered in order that this appellant might limit its liability for the damages done by the barge "Columbia," for the reason that this appellant never sought to limit its liability for any damages caused or done by the said steamer "Ocklahama."

Thirteenth. The district court erred in seizing the said "Ocklahama," and in decreeing that the said "Ocklahama," or her value, should be surrendered in this proceeding, for the reason that if this appellant or the Oregon Railway and Navigation Company, or both of them, were not entitled by reason of the filing of the petition
968 initiating this proceeding, and by reason of the payment into court of the appraised value of the barge "Columbia," and the matters and things done by the petitioners to limit its and their liability to the said Robert Balfour and others, and to the estates of Marshal B. Short and John August Peterson, then and in that event it was the duty of the district court, under the said mandate and under the rules and practice in such cases made and provided, to have dismissed this proceeding, and have allowed the said Robert Balfour and others, and the administratrix of the estate of Marshal B. Short, and the administrator of the estate of John August Peterson, to have taken such remedy as they, or either of them, might have been advised against this appellant or the Oregon Railway and Navigation Company, or to have confined the relief granted to the said Robert Balfour and others, and the said administratrix and administrator to personal decrees and judgments against this appellant or the Oregon Railway and Navigation Company, or both, as the court might have been advised under the evidence and findings of fact.

Fourteenth. The district court erred in decreeing that the steamer "Ocklahama" should be seized, or the said steamer, or her value, surrendered in this proceeding, for the reason that the mandate of the United States circuit court of appeals did not justify or order any such relief to be afforded or given, but that such relief is improper under the practice in proceedings of this character.

W. W. COTTON,
*Proctor for the Appellant, The Oregon Short Line and Utah Northern Railway Company.*

969 Due service by copy accepted.

C. E. S. WOOD,
*Proctor for Balfour, Guthrie & Co.*

(Endorsed:) Filed January 7, 1898. E. D. McKee, clerk.

And afterwards, to wit, on the 7th day of January, 1898, there was duly filed in said court a bond on appeal of the Oregon Short Line and Utah Northern Railway Company from decree of December 20, 1897, in words and figures as follows, to wit:

In the District Court of the United States for the District of Oregon.

In the Matter of the Petition of the Oregon Railway and Navigation Company as the Owner of the Barge "Columbia" and the Oregon Short Line and Utah Northern Railway Company as Lessee Thereof to Limit Liability for Damage Done by the said Barge "Columbia."

*Bond on Appeal of Oregon Short Line and Utah Northern Railway Company from Decree of December* 20, 1897.

Know all men by these presents, that we, the Oregon Short Line and Utah Northern Railway Company and Henry Failing, are held and firmly bound unto Robert Balfour, Stephen Williamson,
970 Alexander Guthrie, Robert Brodie Forman, R. Bruce, and Walter J. Burns, partners as Balfour, Guthrie & Co., and Malvina Short, administratrix of Marshal B. Short, deceased, and Sven Anderson, administrator of the estate of John August Peterson, deceased, in the sum of five hundred dollars ($500), to be paid to the said Robert Balfour, Stephen Williamson, Alexander Guthrie, Robert Brodie Forman, R. Bruce, and Walter J. Burns, partners as Balfour, Guthrie & Co., and Malvina Short, administratrix of Marshal B. Short, deceased, and Sven Anderson, administrator of the estate of John August Peterson, deceased, for the payment of which, well and truly to be made, we bind ourselves, and each of us, and our and each of our heirs, executors, administrators, successors, and assigns, jointly and severally, firmly by these presents.

Signed with our seals and dated this 6th day of January, 1888.

Whereas the above-named, The Oregon Short Line and Utah Northern Railway Company, prosecuted an appeal to the United States circuit court of appeals for the ninth circuit to reverse the decree rendered in the above-entitled proceeding by the district court of the United States, for the district of Oregon, in favor of the said Robert Balfour, Stephen Williamson, Alexander Guthrie, Robert Brodie Forman, R. Bruce, and Walter J. Burns, partners as Balfour, Guthrie & Co., and Malvina Short, administratrix of Marshal B. Short, deceased, and Sven Anderson, administrator of the estate of John August Peterson, deceased.

Now, therefore, the condition of this obligation is such that if the above-named, the said Oregon Short Line and Utah North-
971 ern Railway Company shall prosecute said appeal to effect and answer all costs, if it shall fail to make said appeal good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

THE OREGON SHORT LINE AND UTAH NORTHERN RAILWAY COMPANY,
By W. W. COTTON, *Its Attorney.* [SEAL.]
HENRY FAILING. [SEAL.]

STATE OF OREGON,
*County of Multnomah,* } ss:

I, Henry Failing, being first duly sworn, depose and say that I am a resident and householder within the district of Oregon, and am worth the sum of one thousand dollars ($1,000) over and above my just debts and liabilities, exclusive of property exempt from execution.

HENRY FAILING.

Subscribed and sworn to before me this 6th day of January, 1898.

W. C. BRISTOL,
*Notary Public in and for Oregon.*

The above bond and surety thereto is hereby approved this 7th day of January, 1898.

CHARLES B. BELLINGER, *Judge.*

(Endorsed:) Filed January 7, 1898. E. D. McKee, clerk.

972 And to wit, on the 6th day of January, 1898, there was duly filed in said court a petition of the Oregon Railroad and Navigation Company for appeal from decree of December 20, 1897, in words and figures as follows, to wit:

In the District Court of the United States for the District of Oregon.

In the Matter of the Petition of the Oregon Railway and Navigation Company as the Owner of the Barge "Columbia" and the Oregon Short Line and Utah Northern Railway Company as Lessee Thereof to Limit Liability for Damage Done by the said Barge "Columbia."

*Petition of Oregon Railroad and Navigation Company for Appeal from Decree of December 20, 1897.*

The Oregon Railroad and Navigation Company conceives itself aggrieved by the decree entered in the above-entitled proceeding on the 20th day of December, 1897, upon the vacation and setting aside of the decree entered in the above-entitled proceeding on August 2, 1897, both of said decrees being in favor of Robert Balfour, Stephen Williamson, Alexander Guthrie, Robert Brodie Forman, R. Bruce, and Walter J. Burns, partners as Balfour, Guthrie & Co., and in favor of Malvina Short, administratrix of the estate of Marshal B. Short, deceased, and Sven Anderson, administrator
973 of the estate of John August Peterson, deceased, and ordering and decreeing that the Oregon Railroad and Navigation Company pay into the registry of the above-entitled court, for distribution as provided in said decree, the sum of eighty-six hundred dollars ($8,600.00), and for costs as provided in said decree, and doth hereby appeal from the said decree to the United States circuit court of appeals for the ninth circuit, and prays that this its appeal

may be allowed, and that a transcript of the record and proceedings and papers upon which said decree was made, duly authenticated, may be sent to the United States circuit court of appeals for the ninth circuit.

COX, COTTON, TEAL & MINOR,
*Proctors for the Petitioner and Appellant, The Oregon Railroad and Navigation Company.*

(Endorsed:) Filed January 6, 1898. E. D. McKee, clerk.

974 And afterwards, to wit, on Thursday, the 6th day of January, 1898, the same being the 58th judicial day of the regular November term of said court—present, the Honorable Charles B. Bellinger, United States district judge, presiding—the following proceedings were had in said case, to wit:

In the District Court of the United States for the District of Oregon.

In the Matter of the Petition of the Oregon Railway and Navigation Company as the Owner of the Barge "Columbia" and the Oregon Short Line and Utah Northern Railway Company as Lessee Thereof to Limit Liability for Damage Done by the said Barge "Columbia." No. 3163.

*Order Allowing Oregon Railroad and Navigation Company Appeal from Decree of December 20, 1897, etc.*

Now, on this day, comes the Oregon Railroad and Navigation Company, by W. W. Cotton, of counsel, and presents to the court its petition praying for an order allowing an appeal by it to the United States circuit court of appeals for the ninth circuit, from the decree heretofore entered in this cause on December 20, 1897,
975 upon the vacation and setting aside of the decree heretofore entered in this cause on August 2, 1897, and also moves the court to fix the amount of the bond to act as a supersedeas of said decree to be given by it on such appeal.

Whereupon, it is ordered that the prayer of said petition be granted, and that said respondents be, and are hereby, allowed to take the appeal prayed for therein, upon giving a bond for damages and costs on such appeal, with sureties to be approved by the judge making this order, in the sum of fifteen hundred dollars ($1,500), and that when said bond is so given, the said bond shall act as a supersedeas of said decree.

Done in open court January 6, 1898.

CHARLES B. BELLINGER, *Judge.*

(Endorsed:) Filed January 6, 1898. E. D. McKee, clerk.

976 And afterwards, to wit, on the 7th day of January, 1898, there was duly filed in said court an assignment of errors on appeal of the Oregon Railroad and Navigation Company from decree of December 20, 1897, in words and figures as follows, to wit:

In the District Court of the United States for the District of Oregon.

In the Matter of the Petition of the Oregon Railway and Navigation Company as the Owner of the Barge "Columbia" and the Oregon Short Line and Utah Northern Railway Company as Lessee Thereof to Limit Liability for Damage Done by the said Barge "Columbia."

*Assignment of Errors on Appeal of Oregon Railroad and Navigation Company from Decree of Dec. 20, 1897.*

Comes now the Oregon Railroad and Navigation Company, and makes this its assignment of errors on the appeal taken by it in the above-entitled proceeding from the decree entered by the district court of the United States for the district of Oregon, and states that error was committed by the said court in the making of said decree in the above-entitled cause, and in the proceedings prior thereto, in the following matters, to wit:

First. That the said district court had no jurisdiction under
977 the mandate of the United States circuit court of appeals to enter any decree imposing any liability upon this appellant or the steamer "Ocklahama."

Second. The district court erred in entering the decree appealed from for the reason that the said appeal is not in accordance with the opinion of the United States circuit court of appeals in this proceeding on the former appeal, and is inconsistent therewith.

Third. The district court erred in seizing the steamer "Ocklahama," and in making the decree appealed from, for the reason that the seizure of the said "Ocklahama" was not required by the mandate of the United States circuit court of appeals, and was contrary to the said mandate, and the district court was without power or authority in this cause to issue process against the "Ocklahama" or to cause the "Ocklahama" to be seized.

Fourth. The district court erred in seizing the "Ocklahama," and in making said decree, for the reason that no libel *in rem* had, or has ever been, filed in this proceeding against the "Ocklahama."

Fifth. The district court erred in seizing the "Ocklahama," and in entering the decree herein appealed from, for reason that this proceeding was commenced by Oregon Railway and Navigation Company and Oregon Short Line and Utah Northern Railway Co. to limit their personal liability, and was a suit *in personam*, and that the seizure of the said "Ocklahama" under the said decree entered herein changed the said proceeding *in personam* arising out of a collision into a proceeding *in rem*, and is contrary to the admiralty rules and practice of the Supreme Court of the United States.

Sixth. The district court erred in find that Malvina Short,
978 administratrix of the estate of Marshal B. Short, deceased, had sustained damage in the sum of five thousand dollars ($5,000), and in decreeing that said Malvina Short, as such admin-

istratrix, should have and recover said sum or a portion thereof from the Oregon Railroad and Navigation Company, claimant of the "Ocklahama," for the reason that it appears by the evidence and the findings of fact made by the district court on a former trial, and from the opinion of the United States circuit court of appeals in this cause, that any and all injuries received by the said Marshal B. Short were the result of his own contributory negligence.

Seventh. The district court erred in decreeing that Malvina Short, administratrix of the estate of Marshal B. Short, deceased, should have and recover the sum of five thousand dollars ($5,000) and in decreeing that the same, or any portion of the same, should be paid out of the fund represented by the bond given by the Oregon Railroad and Navigation Company, the claimant of the steamer "Ocklahama," for the reason that it appears from the evidence and the findings of fact, and from the opinion of the United States circuit court of appeals, that any and all injuries received by the said Marshal B. Short were the result of his negligence, or that of his fellow-servants, and without any negligence on the part of this appellant, or the Oregon Short Line and Utah Northern Railway Company, or the Oregon Railway and Navigation Company, or the steamer "Ocklahama."

Eighth. The district court erred in decreeing that Sven Anderson, administrator of the estate of John August Peterson,
979 should have and recover the sum of three thousand dollars ($3,000), and decreeing that the same, or any part of the same, should be paid out of the fund represented by the bond given by the Oregon Railroad and Navigation Company, the claimant of the "Ocklahama," for the reason that it appears by the evidence and findings of fact, and the opinion of the United States circuit court of appeals, that any and all injuries received by the said John August Peterson were received as the result of negligence of his fellow-servants, and without any negligence on the part of this appellant or the Oregon Short Line and Utah Northern Railway Company, or the Oregon Railway and Navigation Company, or the steamer "Ocklahama."

Ninth. The district court erred in decreeing that the steamer "Ocklahama," or her value, should be surrendered in order that this appellant might limit its liability to the said Robert Balfour and others, and to the said Malvina Short, administratrix as aforesaid, and the said Sven Anderson, administrator as aforesaid, for the reason that there is no evidence showing that the towage services of the steamtug "Ocklahama" were not fully performed when the said barge "Columbia" was placed alongside of the dock at Astoria, but, on the contrary, the evidence shows that said services of the said "Ocklahama" were at the time of the alleged injuries to said persons, and each of them, fully performed.

Tenth. The district court erred in seizing the "Ocklahama," and in decreeing that the said "Ocklahama," or her value, should be surrendered in this proceeding, for the reason that if the Oregon Rail-
way and Navigation Company, or the Oregon Short Line
980 and Utah Northern Railway Company, or both of them, were not entitled by reason of the filing of the petition initiat-

ing this proceeding, and by reason of the payment into court of the appraised value of the barge "Columbia," and of the matters and things done by the said petitioners to limit their liability, then and in that event it was the duty of the district court, under the said mandate and under the rules and practice in such cases made and provided, to have dismissed this proceeding, and have allowed the said Robert Balfour and others, and the administratrix of the estate of Marshal B. Short, and the administrator of the estate of John August Peterson, to have taken such remedy as they, or either of them, might have been advised against the Oregon Railway and Navigation Company or the Oregon Short Line and Utah Northern Railway Company, or both, or to have confined the relief granted to the said Robert Balfour and others, and the said administratrix and administrator, to personal decrees and judgments against the Oregon Railway and Navigation Company or the Oregon Short Line and Utah Northern Railway Company, or both, as the court might have been advised under the evidence and findings of fact.

Eleventh. The district court erred in sustaining the exceptions of Robert Balfour and others to the answer of the Oregon Railroad and Navigation Company to the answer of the said Robert Balfour and others, said answer of the Oregon Railroad and Navigation Company being filed July 28, 1897; and erred in refusing to allow the Oregon Railroad and Navigation Company to introduce evidence in support of its said answer, and in depriving the said
981 The Oregon Railroad and Navigation Company, as the claimant of the steamer "Ocklahama," of a trial upon the issues made by said answer.

Twelfth. The district court erred in sustaining the exceptions of Anna C. Larson, mother of John August Peterson, to the answer of the Oregon Railroad and Navigation Company to the answer of the said Anna C. Larson, mother of John August Peterson, said answer of the Oregon Railroad and Navigation Company being filed July 28, 1897; and erred in refusing to allow the Oregon Railroad and Navigation Company to introduce evidence in support of its said answer, and in depriving the said The Oregon Railroad and Navigation Company, as the claimant of the steamer "Ocklahama," of a trial upon the issues made by said answer.

Thirteenth. The district court erred in sustaining the exceptions of Sven Anderson, administrator of the estate of John August Peterson, deceased, to the answer of the Oregon Railroad and Navigation Company to the answer of the said Sven Anderson, administrator of the estate of John August Peterson, deceased, said answer of the Oregon Railroad and Navigation Company being filed July 28, 1897; and erred in refusing to allow the Oregon Railroad and Navigation Company to introduce evidence in support of its said answer, and in depriving the said The Oregon Railroad and Navigation Company, as the claimant of the steamer "Ocklahama," of a trial upon the issues made by said answer.

Fourteenth. The district court erred in sustaining the exceptions of Malvina Short, administratrix of the estate of Marshal B. Short,

deceased, to the answer of the Oregon Railroad and Navi-
982 gation Company to the answer of the said Malvina Short, administratrix of the estate of Marshal B. Short, deceased, said answer of the Oregon Railroad and Navigation Company being filed July 28, 1897; and erred in refusing to allow the Oregon Railroad and Navigation Company to introduce evidence in support of its said answer, and in depriving the said The Oregon Railroad and Navigation Company, as the claimant of the steamer "Ocklahama," of a trial upon the issues made by said answer.

Fifteenth. The district court erred in refusing to allow the Oregon Railroad and Navigation Company to introduce evidence in support of its several answers to the answer of Robert Balfour and others, and in depriving the Oregon Railroad and Navigation Company and the steamer "Ocklahama" of a trial upon the issues made by said answer and of its day in court.

Sixteenth. The district court erred in refusing to allow the Oregon Railroad and Navigation Company to introduce evidence in support of its several answers to the answer of Sven Anderson, administrator of the estate of John August Peterson, deceased, and in depriving the Oregon Railroad and Navigation Company and the steamer "Ocklahama" of a trial upon the issues made by said answer and of its day in court.

Seventeenth. The district court erred in refusing to allow the Oregon Railroad and Navigation Company to introduce in support of its several answers to the answer of Malvina Short, administratrix of the estate of Marshal B. Short, deceased, and in depriving the Oregon Railroad and Navigation Company, and the
983 steamer "Ocklahama" of a trial on the issues made by said answer and of its day in court.

Eighteenth. The district court erred in decreeing that Robert Balfour and others had any interest in or lien upon the steamer "Ocklahama" as the result of any decree or proceedings had in this suit superior to the right, title, interest, and estate of this appellant, arising by reason of the purchase of the said steamer by this appellant, as the result of the foreclosure of the mortgage made by the Oregon Railway and Navigation Company, to the Farmers' Loan and Trust Company, and referred to in the answer of this appellant to the answer of Robert Balfour and others, such answer of appellant being filed July 28, 1897.

Nineteenth. The district court erred in decreeing that Sven Anderson, administrator of the estate of John August Peterson, deceased, had any interest in or lien upon the steamer "Ocklahama" as the result of any decree or proceedings had in this suit superior to the right, title, interest, and estate of this appellant, arising by reason of the purchase of the said steamer by this appellant as the result of the foreclosure of the mortgage made by the Oregon Railway and Navigation Company to the Farmers' Loan and Trust Company, and referred to in the answer of this appellant to the answer of Sven Anderson, administrator of the estate of John August Peterson, deceased, such answer of appellant being filed July 28, 1897.

Twentieth. The district court erred in decreeing that Malvina Short, administratrix of the estate of Marshal B. Short, deceased, had any interest in or lien upon the steamer "Ocklahama" as the result of any decree or proceedings had in this suit superior
984 to the right, title, interest, and estate of this appellant, arising by reason of the purchase of the said steamer by this appellant, as the result of the foreclosure of the mortgage made by the Oregon Railway and Navigation Company to the Farmers' Loan and Trust Company, and referred to in the answer of this appellant to the answer of Málvina Short, administratrix of the estate of Marshal B. Short, deceased, such answer of appellant being filed July 28, 1897.

Twenty-first. The district court erred in decreeing that this appellant and its bondsman, J. G. Woodworth, or either of them, were liable for any portion of the services of the marshal's keeper of the said "Ocklahama" prior to September 30, 1896, and erred in decreeing that Robert Balfour and others and Malvina Short, administratrix of the estate of Marshal B. Short, as aforesaid, and Sven Anderson as aforesaid, should have and recover any part of said fees against this appellant or against its bondsman, J. G. Woodworth, and erred in decreeing that execution should issue therefor.

W. W. COTTON,
*Proctor for Appellant, The Oregon Railroad and Navigation Company.*

Due service of copy accepted.

C. E. S. WOOD,
*Proctor for Balfour, Guthrie & Co.*

(Endorsed:) Filed January 7, 1898. E. D. McKee, clerk.

985 And afterwards, to wit, on the 7th day of January, 1898, there was duly filed in said court a bond of the Oregon Railroad and Navigation Company on appeal from decree of December 20, 1897, in words and figures as follows, to wit:

In the District Court of the United States for the District of Oregon.

In the Matter of the Petition of the Oregon Railway and Navigation Company as the Owner of the Barge "Columbia" and the Oregon Short Line and Utah Northern Railway Company as Lessee Thereof to Limit Liability for Damage Done by the said Barge "Columbia."

*Bond of Oregon Railroad & Navigation Company on Appeal from Decree of December 20, 1897.*

Know all men by these presents, that we, the Oregon Railroad and Navigation Company and Henry Failing, are held and firmly bound unto Robert Balfour, Stephen Williamson, Alexander Guthrie, Robert Brodie Forman, R. Bruce, and Walter J. Burns, partners as Balfour, Guthrie & Co., and Malvina Short, administratrix of the

estate of Marshal B. Short, deceased, and Sven Anderson, administrator of the estate of John August Peterson, deceased, in the sum of fifteen hundred dollars ($1,500), to be paid to the said Robert Balfour, Stephen Williamson, Alexander Guthrie, Robert Brodie Forman, R. Bruce, and Walter J. Burns, partners as Balfour,
986 Guthrie & Co., and Malvina Short, administratrix of the estate of Marshal B. Short, deceased, and Sven Anderson, administrator of the estate of John August Peterson, deceased, for the payment of which, well and truly to be made, we bind ourselves and each of us, and our and each of our heirs, executors, administrators, successors, and assigns, jointly and severally, firmly by these presents.

Signed with our seals and dated this 6th day of January, 1898.

Whereas, the above-named, The Oregon Railroad and Navigation Company, prosecuted an appeal to the United States circuit court of appeals for the ninth circuit, to reverse the decree rendered in the above-entitled proceeding by the district court of the United States, for the district of Oregon, in favor of the said Robert Balfour, Stephen Williamson, Alexander Guthrie, Robert Brodie Forman, R. Bruce, and Walter J. Burns, partners as Balfour, Guthrie & Co., and Malvina Short, administratrix of the estate of *Maxwell* B. Short, deceased, and Sven Anderson, administrator of the estate of John August Peterson, deceased.

Now, therefore, the condition of this obligation is such that if the above-named, the said The Oregon Railroad and Navigation Company, shall prosecute said appeal to effect and answer all costs, if it shall fail to make said appeal good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

THE OREGON RAILROAD AND NAVIGATION COMPANY,
By W. W. COTTON, [SEAL.]
*Its Attorney.*
HENRY FAILING. [SEAL.]

987 COUNTY OF MULTNOMAH, } ss.:
*State of Oregon,* }

I, Henry Failing, being first duly sworn, depose and say that I am a resident and householder within the district of Oregon, and am worth the sum of three thousand dollars ($3,000) over and above my just debts and liabilities, exclusive of property exempt from execution.

HENRY FAILING.

Subscribed and sworn to before me this 6th day of January, 1898.

W. C. BRISTOL,
*Notary Public in and for Oregon.*

The above bond and surety thereto is hereby approved this 7th day of January, 1898.

CHARLES B. BELLINGER, *Judge.*

(Endorsed:) Filed January 7, 1898. E. D. McKee, clerk.

988 And afterwards, to wit, on the 14th day of January, 1898, there was duly filed in said court, an affidavit of service of assignments of error of Oregon Railway and Navigation Company, Oregon Short Line and Utah Northern Railway Company, and Oregon Railroad and Navigation Company, in words and figures as follows, to wit:

In the District Court of the United States for the District of Oregon.

In the Matter of the Petition of the Oregon Railway and Navigation Company as the Owner of the Barge "Columbia" and the Oregon Short Line and Utah Northern Railway Company as Lessee Thereof to Limit Liability for Damage Done by said Barge "Columbia."

*Affidavit of Service of Assignment of Error, etc.*

STATE OF OREGON, *Multnomah County,* } ss:

I, Henry F. Conner, being first duly sworn, on my oath say: That I served the assignments of error herein of the Oregon Railroad and Navigation Company, the assignments of error herein of the Oregon Railway and Navigation Company, and the assignments of error herein of the Oregon Short Line and Utah Northern Railroad Company, upon E. B. Watson, proctor for Malvina Short, Sven Anderson, and Anna C. Larsen, at eleven o'clock in the forenoon of Friday, January 7th, 1898, by leaving full, true and correct copies of the same, and of each of them, duly certified to as
989 such by W. W. Cotton, proctor for appellants, with B. B. Beekman, at the office of E. B. Watson, 308 Commercial building, Portland, Oregon; that said E. B. Watson was at the time of said service absent from his office, and that at said time the said B. B. Beekman was a person having charge thereof.

HENRY F. CONNER.

Subscribed and sworn to before me this 13th day of January, 1898.

[SEAL.]

W. C. BRISTOL,
*Notary Public for Oregon.*

(Endorsed:) Filed January 14, 1898. E. D. McKee, clerk.

And afterwards, to wit, on the 22d day of January, 1898, there was duly filed in said court a bond of the Oregon Railroad and Navigation Company on appeal from decree of December 20, 1897, in words and figures as follows, to wit:

In the District Court of the United States for the District of Oregon.

In the Matter of the Petition of the Oregon Railway and Navigation Company as the Owner of the Barge "Columbia" and the Oregon Short Line and Utah Northern Railway Company as Lessee Thereof to Limit Liability for Damage Done by the said Barge "Columbia."

990 *Bond of Oregon Railroad and Navigation Company on Appeal from Decree of December* 20, 1897.

Know all men by these presents that we, the Oregon Railroad and Navigation Company and Henry Failing, are held and firmly bound unto Robert Balfour, Stephen Williamson, Alexander Guthrie, Robert Brodie Forman, R. Bruce, and Walter J. Burns, partners as Balfour, Guthrie & Co., and Malvina Short, administratrix of the estate of Marshal B. Short, deceased, and Sven Anderson, administrator of the estate of John August Peterson, deceased, in the sum of fifteen hundred dollars ($1,500), to be paid to the said Robert Balfour, Stephen Williamson, Alexander Guthrie, Robert Brodie Forman, R. Bruce, and Walter J. Burns, partners as Balfour, Guthrie & Co., and Malvina Short, administratrix of the estate of Marshal B. Short, deceased, and Sven Anderson, administrator of the estate of John August Peterson, deceased, for the payment of which, well and truly to be made, we bind ourselves and each of us, and our and each of our heirs, executors, administrators, successors, and assigns, jointly and severally, firmly by these presents.

Signed with our seals and dated this 22d day of January, 1898.

Whereas, the above-named, The Oregon Railroad and Navigation Company prosecuted an appeal to the United States circuit court of appeals for the ninth circuit, to reverse the decree rendered in the above-entitled proceeding by the district court of the United States, for the district of Oregon, on December 20, 1897, upon the
991 vacation and setting aside of the decree heretofore entered herein on August 2, 1897, in favor of the said Robert Balfour, Stephen Williamson, Alexander Guthrie, Robert Brodie Forman, R. Bruce, and Walter J. Burns, partners as Balfour, Guthrie & Co., and Malvina Short, administratrix of the estate of Marshal B. Short, deceased, and Sven Anderson, administrator of the estate of John August Peterson, deceased.

Now, therefore, the condition of this obligation is such, that if the above-named, the said The Oregon Railroad and Navigation Company shall prosecute said appeal to effect, and answer all damages and costs, if it shall fail to make said appeal good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

THE OREGON RAILROAD AND
NAVIGATION CO.,
By W. W. COTTON,
*Its Proctor and General Attorney.*
HENRY FAILING.

STATE OF OREGON, } ss:
*County of Multnomah,* }

I, Henry Failing, being first duly sworn, depose and say that I am a resident and householder within the district of Oregon, and am worth the sum of three thousand dollars ($3,000) over and above my just debts and liabilities, exclusive of property exempt from execution.

HENRY FAILING.

Subscribed and sworn to before me this 22d day of January, 1898.

H. F. CONNER,
*Notary Public in and for Oregon.*

992 The above bond and surety thereto is hereby approved this 22d day of January, 1898.

CHARLES B. BELLINGER, *Judge.*

(Endorsed:) Filed January 22, 1898. E. D. McKee, clerk.

And afterwards, to wit, on the 22d day of January, 1898, there was duly filed in said court, a stipulation as to printing record, in words and figures as follows, to wit:

In the District Court of the United States for the District of Oregon.

In the Matter of the Petition of the Oregon Railway and Navigation Company as Owner of the Barge "Columbia" and the Oregon Short Line and Utah Northern Railway Company as Lessee Thereof to Limit Liability for Damage Done by the said Barge "Columbia."

*Stipulation as to Printing of Record.*

It is stipulated by and between the Oregon Railway and Navigation Company, the Oregon Railroad and Navigation Com-
993 pany, the Oregon Short Line and Utah Northern Railway Company, Edwin McNeill, receiver, and Malvina Short, administratrix, Sven Anderson, administrator, Anna Larson, and Robert Balfour, *et al.*, partners doing business as Balfour, Guthrie & Co., that in each of the appeals taken by the Oregon Railway and Navigation Company, the Oregon Railroad and Navigation Company, and the Oregon Short Line and Utah Northern Railway Company, from the decree or decrees in this cause rendered, but one record need be prepared and certified to the circuit court of appeals for the ninth circuit, and that in each of said appeals the said record may be referred to, used, and considered in all respects as if said record had been certified in each of the said several appeals, and that in each of the several appeals taken by Robert Balfour and others, partners doing business as Balfour, Guthrie & Co., from the decree or decrees in this cause rendered, the said Bal

four, Guthrie & Co. may refer to and use the record certified to in the appeal or appeals of the Oregon Railway and Navigation Company, the Oregon Railroad and Navigation Company, and the Oregon Short Line and Utah Northern Railway Company, in all respects as if said record had been certified in each of the several appeals taken as aforesaid by the said Balfour, Guthrie & Co., and the said records shall be considered as forming a part of the record in the several appeals taken by the said Balfour, Guthrie & Co., as well as in the appeals taken by the Oregon Railway and Navigation Company, the Oregon Railroad and Navigation Company, and the Oregon Short Line and Utah Northern Railway Company, but

994 nothing in this stipulation shall limit Balfour, Guthrie & Co. only to the record prepared and certified in the appeal of the Oregon Railway and Navigation Company, the Oregon Railroad and Navigation Company, and the Oregon Short Line and Utah Northern Railway Company, nor shall this stipulation be construed to waive any right or cure any error that may exist in favor of or against any of the parties herein, it being the intention of this stipulation to avoid the preparation of practically duplicate records.

COX, COTTON, TEAL & MINOR,
*Proctors for the Oregon Railway and Navigation Company, the Oregon Railroad and Navigation Company, the Oregon Short Line and Utah Northern Railway Company, and Edwin McNeill, Receiver.*

E. B. WATSON,
*Proctor for Malvina Short, Sven Anderson, and Anna C. Larson.*

WILLIAMS, WOOD & LINTHICUM,
*Proctors for Balfour, Guthrie & Co.*

(Endorsed:) Filed January 22, 1898. E. D. McKee, clerk.

995 And afterwards, to wit, on the 24th day of January, 1898, there was duly filed in said court a petition of the Oregon Railway and Navigation Company for appeal from decree of August 2, 1897, in words and figures as follows, to wit:

In the District Court of the United States for the District of Oregon.

In the Matter of the Petition of the Oregon Railway and Navigation Company as the Owner of the Barge "Columbia" and the Oregon Short Line and Utah Northern Railway Company as the Lessee Thereof to Limit Liability for Damage Done by the said Barge "Columbia."

*Petition of Oregon Railway and Navigation Company for Appeal from Decree of August 2, 1897.*

The Oregon Railway and Navigation Company conceives itself aggrieved by the decree entered by this court in the above-entitled proceeding on August 2, 1897, said decree being in favor of Robert

Balfour, Stephen Williamson, Alexander Guthrie, Robert Brodie Forman, R. Bruce, and Walter J. Burns, partners as Balfour, Guthrie & Co., and in favor of Malvina Short, administratrix of the estate of Marshal B. Short, deceased, and Sven Anderson, administrator of the estate of John August Peterson, deceased, and ordering and decreeing that the Oregon Railroad and Navigation Company
996 pay into the registry of the above-entitled court, for distribution as provided in said decree, the sum of eighty-six hundred dollars ($8,600), and for costs as provided in said decree, and doth hereby appeal from the said decree to the United States circuit court of appeals for the ninth circuit, and prays that this its appeal may be allowed, and that the transcript of the record and proceedings and papers upon which said decree was made, duly authenticated, may be sent to the said United States circuit court of appeals for the ninth circuit, and appellant files herewith a separate and particular assignment of errors in said decree complained of by this appellant.

COX, COTTON, TEAL & MINOR,
*Proctors for the Appellant, The Oregon Railway and Navigation Company.*

Service by copy admitted at Portland, O'g'n, Jan. 24, 1898.

C. E. S. WOOD,
*Attorney for Balfour, Guthrie & Co.*

*Return.*

UNITED STATES OF AMERICA, } ss:
*District of Oregon,* }

I hereby certify that on the 24th day of January, 1898, at Portland, Multnomah county, in said district, I duly served the within petition upon E. B. Watson, proctor for Malvina Short, Sven Anderson, and Anna C. Larson, by delivering to him, personally, a true copy of said petition, duly certified to by me as United States
997 marshal, and duly certified to by W. W. Cotton, proctor for appellants.

ZOETH HOUSER,
*United States Marshal,*
By J. A. WILSON, *Deputy.*

(Endorsed:) Filed January 24, 1898. E. D. McKee, clerk.

And afterwards, to wit, on the 24th day of January, 1898, there was duly filed in said court an assignment of errors on appeal of the Oregon Railway and Navigation Company from decree of August 2, 1897, in words and figures as follows, to wit:

In the District Court of the United States for the District of Oregon.

In the Matter of the Petition of the Oregon Railway and Navigation Company as the Owner of the Barge "Columbia" and the Oregon Short Line and Utah Northern Railway Company as Lessee Thereof to Limit Liability for Damage Done by the said Barge "Columbia."

*Assignment of Errors on Appeal of Oregon Railway and Navigation Company from Decree of August 2, 1897.*

Comes now the Oregon Railway and Navigation Company
998 and makes this its assignment of errors on the appeal, taken by it in the above-entitled proceeding from the decree entered by the district court of the United States for the district of Oregon on August 2, 1897, and states that error was committed by the said court in the making of said decree, and in the proceedings prior thereto, in the following matters, to wit:

First. That under the mandate of the United States circuit court of appeals the district court had no jurisdiction to enter any personal judgment or decree, except for the costs of said proceeding against the appellant.

Second. That the said district court had no jurisdiction to enter any decree under the said mandate imposing any liability upon this appellant or the steamer "Ocklahama."

Third. The district court erred in ordering and decreeing the payment into court of the value of the steamer "Ocklahama," or the delivering to trustees of said steamer, or of any interest in said steamer, as a condition to the right of this appellant to limit its liability in respect of the matters and things alleged in the petition of this appellant initiating this proceeding and filed on the 29th day of November, 1892.

Fourth. The district court erred in entering the decree appealed from for the reason that said decree is not in accordance with the opinion of the United States circuit court of appeals of this proceeding on the former appeal, and is inconsistent therewith.

Fifth. The district court erred in seizing the steamer "Ocklahama," and in making the decree appealed from, for the rea-
999 son that the seizure of the said "Ocklahama" was not required by the mandate of the United States circuit court of appeals, and was contrary to the said mandate, and the district court was without power or authority in this cause to issue process against the "Ocklahama," or to cause the "Ocklahama" to be seized.

Sixth. The district court erred in seizing the "Ocklahama," and in making said decree, for the reason that no libel *in rem* had, or has ever been, filed in this proceeding against the "Ocklahama."

Seventh. The district court erred in seizing the "Ocklahama," and in entering the decree herein appealed from, for the reason that this proceeding was commenced by the Oregon Railway and Navigation Company and the Oregon Short Line and Utah Northern

Railway Company to limit their personal liability, and was a suit *in personam*, and that the seizure of the said "Ocklahama" and the decree entered herein changed the said proceeding *in personam* arising out of the collision into a proceeding *in rem*, and is contrary to the admiralty rules and practice of the Supreme Court of the United States.

Eighth. The district court erred in finding that Malvina Short, administratrix of the estate of Marshal B. Short, deceased, had sustained damage in the sum of five thousand dollars ($5,000), and in decreeing that said Malvina Short, as such administratrix, should have and recover said sum, or a portion thereof, from The Oregon Railroad and Navigation Company, claimant of the "Ocklahama," for the reason that it appears by the evidence and the findings of fact made by the district court on a former trial, and from the opinion of the United States circuit court of appeals in this
1000 cause, that any and all injuries received by the said Marshal B. Short were the result of his own contributory negligence.

Ninth. The district court erred in decreeing that Malvina Short, administratrix of the estate of Marshal B. Short, deceased, should have and recover the sum of $5,000, and in decreeing that the same, or any portion of the same, should be paid out of the fund represented by the bond given by The Oregon Railroad and Navigation Company, the claimant of the steamer "Ocklahama," for the reason that it appears from the evidence and the findings of fact, and from the opinion of the United States circuit court of appeals, that any and all injuries received by the said Marshal B. Short were the result of his own negligence, or that of his fellow-servants, and without any negligence on the part of this appellant, or the Oregon Short Line and Utah Northern Railway Company.

Tenth. The district court erred in decreeing that Sven Anderson, administrator of the estate of John August Peterson, should have and recover the sum of three thousand dollars ($3,000), and decreeing that the same, or any part of the same, should be paid out of the fund represented by the bond given by The Oregon Railroad and Navigation Company, the claimant of the "Ocklahama," for the reason that it appears by the evidence and findings of fact, and the opinion of the United States circuit court of appeals, that any and all injuries received by the said John August Peterson were received as the result of negligence of his fellow-servants, and without any negligence on the part of this appellant or the Oregon Short Line and Utah Northern Railway Company.

Eleventh. The district court erred in decreeing that Rob-
1001 ert Balfour and others, doing business as partners under the name of Balfour, Guthrie & Co., Malvina Short, administratrix of the estate of Marshal B. Short, deceased, and Sven Anderson, administrator of the estate of John August Peterson, deceased, or either of them, should have and recover any sum whatsoever against this appellant, for the reason that it appears from the evidence and findings of fact that this appellant, The Oregon Railway and Navigation Company, had long prior to the date of the alleged injuries to said persons, or any of them, duly leased to the Oregon Short

Line and Utah Northern Railway Company the said barge "Columbia" and the said steamer "Ocklahama," and that the same, and each of them, were exclusively and solely operated at the time of said injuries by the Oregon Short Line and Utah Northern Railway Company, and this appellant had no interest of any kind whatsoever in the said operation, and had made no contract for the carriage of the wheat belonging to the said Robert Balfour and others, and had not in its employ the said Marshal B. Short or the said John August Peterson, and was not liable for any reason to the said persons, or either of them, for any of the injuries received by them, or either of them.

Twelfth. The district court erred in decreeing that the steamer "Ocklahama," or her value, should be surrendered in order that this appellant might limit its liability to the said Robert Balfour and others, and to the said Malvina Short, administratrix as aforesaid, and the said Sven Anderson, administrator as aforesaid, for the reason that there is no evidence showing that the towage
1002 services of the steamtug "Ocklahama" were not fully performed when the said barge "Columbia" was placed alongside of the dock at Astoria, but, on the contrary, the evidence shows that said services of the said "Ocklahama" were at the time of the alleged injuries to said persons, and each of them, fully performed.

Thirteenth. The district court erred in seizing the said steamer "Ocklahama" in this proceeding, or in decreeing that the steamer "Ocklahama" or her value, should be surrendered in order that this appellant might limit its liability for the damages done by the barge "Columbia," for the reason that this appellant never sought to limit its liability for any damages caused or done by the said steamer "Ocklahama."

Fourteenth. The district court erred in seizing the said "Ocklahama," and in decreeing that the said "Ocklahama," or her value, should be surrendered in this proceeding, for the reason that if this appellant or the Oregon Short Line and Utah Northern Railway Company, or both of them, were not entitled by reason of the filing of the petition initiating this proceeding, and by reason of the payment into court of the appraised value of the barge "Columbia," and the matters and things done by the petitioners to limit its and their liability to the said Robert Balfour and others, and to the estates of Marshal B. Short and John August Peterson, then and in that event it was the duty of the district court, under the said mandate and under the rules and practice in such cases made and provided, to have dismissed this proceeding, and have allowed the said Robert Balfour and others, and the administratrix of the
1003 estate of Marshal B. Short and the administrator of the estate of John August Peterson, to have taken such remedy as they, or either of them, might have been advised against this appellant or the Oregon Short Line and Utah Northern Railway Company, or to have confined the relief granted to the said Robert Balfour and others, and the said administratrix and administrator, to personal decrees and judgments against this appellant or the Oregon

Short Line and Utah Northern Railway Company, or both, as the court might have been advised under the evidence and findings of fact.

Fifteenth. The district court erred in decreeing that the steamer "Ocklahama" should be seized, or the said steamer or her value surrendered in this proceeding, for the reason that the mandate of the United States circuit court of appeals did not justify or order any such relief to be afforded or given, but that such relief is improper under the practice in proceedings of this character.

COX, COTTON, TEAL & MINOR,
*Proctors for the Appellant The Oregon Railway and Navigation Company.*

Service by copy admitted at Portland, O'g'n, Jan. 24, 1898.
C. E. S. WOOD,
*Attorney for Balfour, Guthrie & Co.*

*Return.*

UNITED STATES OF AMERICA, }
*District of Oregon,* } ss:

I hereby certify that on the 24th day of January, 1898, at
1004 Portland, Multnomah county, Oregon, in said district, I duly served the within assignments of error upon E. B. Watson, proctor for Malvina Short, Sven Anderson, and Anna C. Larson, by delivering to him personally a true copy of said assignments of error, duly certified to by me as United States marshal, and also certified to as such by W. W. Cotton, proctor for appellants.

ZOETH HOUSER,
*United States Marshal,*
By J. A. WILSON, *Deputy.*

(Endorsed:) Filed January 24, 1898. E. D. McKee, clerk.

And afterwards, to wit, on Monday, the 24th day of January, 1898, the same being the 74th judicial day of the regular November term of said court—present, the Honorable Charles B. Bellinger, United States district judge, presiding—the following proceedings were had in said case, to wit:

In the District Court of the United States for the District of Oregon.

In the Matter of the Petition of the Oregon Railway and Navigation Company as the Owner of the Barge "Columbia" and the Oregon Short Line and Utah Northern Railway Company as Lessee Thereof to Limit Liability for Damage Done by the said Barge "Columbia."

1005 *Order Allowing Appeal of Oregon Railway and Navigation Company from Decree of August 2, 1897.*

Now, on this day, comes the Oregon Railway and Navigation Company, by Wirt Minor, of counsel, and presents to the court its

petition praying for an order allowing an appeal by it to the United States circuit court of appeals for the ninth circuit, from the decree heretofore entered in this cause on August 2, 1897, and moves the court to fix the amount of the cost bond to be given by it on such appeal; whereupon it is—

Ordered that the prayer of the said petition be granted, and the said Oregon Railway and Navigation Company be, and it is hereby allowed to take the appeal as prayed for therein, upon giving a, bond for costs in such appeal, with surety approved by the judge making this order in the sum of five hundred dollars ($500.00).

CHARLES B. BELLINGER, *Judge.*

*Return.*

UNITED STATES OF AMERICA, *District of Oregon,* } ss:

I hereby certify that on the 25th day of January, 1898, at Portland, Multnomah county, Oregon, in said district, I duly served the within order upon E. B. Watson, proctor for Malvina Short, Sven Anderson, and Anna C. Larson, by delivering to him, personally, a true copy of said order, duly certified to by me as United
1006 States marshal, and also certified to as such by E. D. McKee, clerk of the United States district court for the district of Oregon, and also duly certified to by Wirt Minor, of proctors for appellants.

ZOETH HOUSER,
*United States Marshal,*
By J. A. WILSON, *Deputy.*

(Endorsed:) Filed January 24, 1898. E. D. McKee, clerk.

And afterwards, to wit, on the 24th day of January, 1898, there was duly filed in said court a bond of the Oregon Railway and Navigation Company from decree of August 2, 1897, in words and figures as follows, to wit:

In the District Court of the United States for the District of Oregon.

In the Matter of the Petition of the Oregon Railway and Navigation Company as the Owner of the Barge "Columbia" and the Oregon Short Line and Utah Northern Railway Company as Lessee Thereof to Limit Liability for Damage Done by the said Barge "Columbia."

*Bond of Oregon Railway and Navigation Company from Decree of August 2, 1897.*

Know all men by these presents, that we, the Oregon Rail-
1007 way and Navigation Company and Henry Failing, are held and firmly bound unto Robert Balfour, Stephen Williamson, Alexander Guthrie, Robert Brodie Forman, R. Bruce, and Walter

J. Burns, partners as Balfour, Guthrie & Co., and Malvina Short, administratrix of the estate of Marshal B. Short, deceased, and Sven Anderson, administrator of the estate of John August Peterson, deceased, in the sum of five hundred dollars ($500.00), to be paid to the said Robert Balfour, Stephen Williamson, Alexander Guthrie, Robert Brodie Forman, R. Bruce, and Walter J. Burns, partners as Balfour, Guthrie & Co., and Malvina Short, administratrix of the estate of Marshal B. Short, deceased, and Sven Anderson, administrator of the estate of John August Peterson, deceased, for the payment of which, well and truly to be made, we bind ourselves, and each of us, and our and each of our heirs, executors, administrators, successors, and assigns, jointly and severally, firmly by these presents.

Signed with our seals and dated this 24th day of January, 1898.

Whereas, the above-named, The Oregon Railway and Navigation Company, prosecuted an appeal to the United States circuit court of appeals for the ninth circuit, to reverse the decree rendered in the above-entitled proceeding by the district court of the United States for the district of Oregon, on August 2, 1897, in favor of the said Robert Balfour, Stephen Williamson, Alexander Guthrie, Robert Brodie Forman, R. Bruce, and Walter J. Burns, partners as Balfour, Guthrie & Co., and Malvina Short, administratrix of the estate of Marshal B. Short, deceased, and Sven Anderson, administrator of the estate of John August Peterson, deceased:

1008 Now, therefore, the condition of this obligation is such that if the above-named, The Oregon Railway and Navigation Company, shall prosecute said appeal to effect, and answer all costs, if it shall fail to make said appeal good, then this obligation shall be void; otherwise to remain in full force and virtue.

THE OREGON RAILWAY AND NAVIGATION COMPANY,
By W. W. COTTON, *Its Attorney.*
HENRY FAILING. [SEAL.]

County of Multnomah, } ss.
*State of Oregon,* }

I, Henry Failing, being first duly sworn, depose and say that I am a resident and householder within the district of Oregon, and am worth the sum of one thousand dollars ($1,000) over and above my just debts and liabilities, exclusive of property exempt from execution.

HENRY FAILING.

Subscribed and sworn to before me this 24th day of January, 1898.

[SEAL.] H. F. CONNER,
*Notary Public in and for Oregon.*

The above bond and surety thereto is hereby approved this 24th day of January, 1898.

CHARLES B. BELLINGER, *Judge.*

(Endorsed:) Filed January 24, 1898. E. D. McKee, clerk.

1009 And afterwards, to wit, on the 24th day of January, 1898, there was duly filed in said court a petition of the Oregon Short Line and Utah Northern Railway Company for appeal from decree of August 2, 1897, in words and figures as follows, to wit:

In the District Court of the United States for the District of Oregon.

In the Matter of the Petition of the Oregon Railway and Navigation Company as the Owner of the Barge "Columbia" and the Oregon Short Line and Utah Northern Railway Company as the Lessee Thereof to Limit Liability for Damage Done by the said Barge "Columbia."

*Petition of the Oregon Short Line and Utah Northern Railway Company for Appeal from Decree of August 2, 1897.*

The Oregon Short Line and Utah Northern Railway Company conceives itself aggrieved by the decree entered by this court in the above-entitled proceeding on August 2, 1897, said decree being in favor of Robert Balfour, Stephen Williamson, Alexander Guthrie, Robert Brodie Forman, R. Bruce, and Walter J. Burns, partners as Balfour, Guthrie & Co., and in favor of Malvina Short, administratrix of the estate of Marshal B. Short, deceased, and Sven Ander-
1010 son, administrator of the estate of John August Peterson, deceased, and ordering and decreeing that the Oregon Railroad and Navigation Company pay into the registry of the above-entitled court, for distribution, as provided in said decree, the sum of eighty-six hundred dollars ($8,600), and for costs as provided in said decree, and doth hereby appeal from the said decree to the United States circuit court of appeals for the ninth circuit, and prays that this, its appeal, may be allowed, and that the transcript of the record and proceedings and papers upon which said decree was made, duly authenticated, may be sent to the United States circuit court of appeals for the ninth circuit, and appellant files herewith a separate and particular assignment of errors in said decree complained of by this appellant.

COX, COTTON, TEAL & MINOR,
*Proctors for the Appellant The Oregon Short Line and Utah Northern Railway Company.*

Service by copy admitted at Portland, O'g'n, Jan. 24, 1898.
C. E. S. WOOD,
*Attorney for Balfour, Guthrie & Co.*

*Return.*

UNITED STATES OF AMERICA, } ss:
*District of Oregon,* }

I hereby certify that on the 24th day of Jan'y, 1898, at Portland, Multnomah county, in said district, I duly served the within peti-

tion upon E. B. Watson, proctor for Malvina Short, Sven
1011 Anderson and Anna C. Larson, by delivering to him, personally, a true copy of said petition, duly certified to by me as United States marshal, and duly certified to by W. W. Cotton, proctor for appellants.

ZOETH HOUSER,
*United States Marshal,*
By J. A. WILSON, *Deputy.*

(Endorsed:) Filed January 24, 1898. E. D. McKee, clerk.

And afterwards, to wit, on the 24th day of January, 1898, there was duly filed in said court an assignment of errors of the Oregon Short Line and Utah Northern Railway Company on appeal from decree of August 2, 1897, in words and figures as follows, to wit:

In the District Court of the United States for the District of Oregon.

In the Matter of the Petition of the Oregon Railway and Navigation Company as the Owner of the Barge "Columbia" and the Oregon Short Line and Utah Northern Railway Company as Lessee Thereof to Limit Liability for Damage Done by the said Barge "Columbia."

*Assignment of Errors of Oregon Short Line and Utah Northern Railway Company on Appeal from Decree of August 2, 1897.*

Comes now the Oregon Short Line and Utah Northern Railway Company and makes this its assignment of errors on the ap-
1012 peal taken by it in the above-entitled proceeding from the decree entered by the district court of the United States for the district of Oregon, on August 2, 1897, and states that error was committed by the said court in the making of said decree and in the proceedings prior thereto, in the following matters, to wit:

First. That under the mandate of the United States circuit court of appeals, the district court had no jurisdiction to enter any personal judgment or decree, except for the costs of said proceeding against the appellant.

Second. That the said district court had no jurisdiction to enter any decree under the said mandate imposing any liability upon this appellant or the steamer "Ocklahama."

Third. The district court erred in ordering and decreeing the payment into court of the value of the steamer "Ocklahama," or the delivering to trustees of said steamer, or of any interest in said steamer, as a condition to the right of this appellant to limit its liability in respect of the matters and things alleged in the petition of this appellant initiating this proceeding and filed on the 29th day of November, 1892.

Fourth. The district court erred in entering the decree appealed from for the reason that said decree is not in accordance with the opinion of the United States circuit court of appeals of this proceeding on the former appeal, and is inconsistent therewith.

Fifth. The district court erred in seizing the steamer "Ocklahama," and in making the decree appealed from, for the reason that the seizure of the said "Ocklahama" was not required by the mandate of the United States circuit court of appeals, and was
1013 contrary to the said mandate, and the said district court was without power or authority in this cause to issue process against the "Ocklahama," or to cause the "Ocklahama" to be seized.

Sixth. The district court erred in seizing the "Ocklahama," and in making said decree, for the reason that no libel *in rem* had, or has ever been, filed in this proceeding against the "Ocklahama."

Seventh. The district court erred in seizing the "Ocklahama," and in entering the decree herein appealed from, for the reason that this proceeding was commenced by the Oregon Railway and Navigation Company and the Oregon Short Line and Utah Northern Railway Company to limit their personal liability, and was a suit *in personam*, and that the seizure of the said "Ocklahama" and the decree entered herein changed the said proceeding *in personam* arising out of the collision into a proceeding *in rem*, and is contrary to the admiralty rules and practice of the Supreme Court of the United States.

Eighth. The district court erred in finding that Malvina Short, administratrix of the estate of Marshal B. Short, deceased, had sustained damage in the sum of five thousand dollars ($5,000), and in decreeing that said Malvina Short, as such administratrix, should have and recover said sum, or a portion thereof, from the Oregon Railroad and Navigation Company, the claimant of the "Ocklahama," for the reason that it appears by the evidence and the findings of fact made by the district court on a former trial, and from the opinion of the United States circuit court of appeals in
1014 this case, that any and all injuries received by the said Marshal B. Short were the result of his own contributory negligence.

Ninth. The district court erred in decreeing that Malvina Short, administratrix of the estate of Marshal B. Short, deceased, should have and recover the sum of $5,000, and in decreeing that the same, or any portion of the same, should be paid out of the fund represented by the bond given by The Oregon Railroad and Navigation Company, the claimant of the steamer "Ocklahama," for the reason that it appears from the evidence and the findings of fact, and from the opinion of the United States circuit court of appeals, that any and all injuries received by the said Marshal B. Short were the result of his own negligence or that of his fellow-servants, and without any negligence on the part of this appellant, or the Oregon Railway and Navigation Company.

Tenth. The district court erred in decreeing that Sven Anderson, administrator of the estate of John August Peterson, should have and recover the sum of three thousand dollars ($3,000), and decreeing that the same, or any part of the same, should be paid out of the fund represented by the bond given by The Oregon Railroad and Navigation Company, the claimant of the "Ocklahama," for the reason that it appears by the evidence and findings of fact, and

the opinion of the United States circuit court of appeals, that any and all injuries received by the said John August Peterson were received as the result of negligence of his fellow-servants, and without any negligence on the part of this appellant or the Oregon Railway and Navigation Company.

1015 Eleventh. The district court erred in decreeing that the steamer "Ocklahama," or her value, should be surrendered in order that this appellant might limit its liability to the said Robert Balfour and others, and to the said Malvina Short, administratrix as aforesaid, and the said Sven Anderson, administrator as aforesaid, for the reason that there is no evidence showing that the towage services of the steamtug "Ocklahama" were not fully performed when the said barge "Columbia" was placed alongside of the dock at Astoria, but, on the contrary, the evidence shows that said services of the said "Ocklahama" were at the time of the alleged injuries to said persons, and each of them, fully performed.

Twelfth. The district court erred in seizing the said steamer "Ocklahama" in this proceeding, or in decreeing that the steamer "Ocklahama," or her value, should be surrendered in order that this appellant might limit its liability for the damages done by the barge "Columbia," for the reason that this appellant never sought to limit its liability for any damages caused or done by the said steamer "Ocklahama."

Thirteenth. The district court erred in seizing the said "Ocklahama," and in decreeing that the said "Ocklahama," or her value should be surrendered in this proceeding, for the reason that if this appellant or the Oregon Railway and Navigation Company, or both of them, were not entitled by reason of the filing of the petition initiating this proceeding, and by reason of the payment into court of the appraised value of the barge "Columbia," and the matters and things done by the petitioners to limit its and their

1016 liability to the said Robert Balfour and others, and to the estates of Marshal B. Short and John August Peterson, then and in that event it was the duty of the district court under the said mandate, and under the rules and practice in such cases made and provided, to have dismissed this proceeding, and have allowed the said Robert Balfour and others, and the administratrix of the estate of Marshal B. Short and the administrator of the estate of John August Peterson, to have taken such remedy as they, or either of them, might have been advised against this appellant or the Oregon Railway and Navigation Company, or to have confined the relief granted to the said Robert Balfour and others, and the said administratrix and administrator, to personal decrees and judgments against this appellant or the Oregon Railway and Navigation Company, or both, as the court might have been advised under the evidence and findings of fact.

Fourteenth. The district court erred in decreeing that the steamer "Ocklahama" should be seized, or the said steamer or her value surrendered in this proceeding, for the reason that the mandate of the United States circuit court of appeals did not justify or order any

such relief to be afforded or given, but that such relief is improper under the practice in proceedings of this character.

COX, COTTON, TEAL & MINOR,
*Proctors for the Appellant, The Oregon Short Line and Utah Northern Railway Company.*

Service by copy admitted at Portland, O'g'n, Jan. 24, 1898.
C. E. S. WOOD,
*Attorney for Balfour, Guthrie & Co.*

1017 *Return.*

UNITED STATES OF AMERICA, }
*District of Oregon,* } *ss:*

I hereby certify that on the 24th day of January, 1898, at Portland, Multnomah county, O'g'n, in said district, I duly served the within assignments of error upon E. B. Watson, proctor for Malvina Short, Sven Anderson, and Anna C. Larson, by delivering to him, personally, a true copy of said assignments of error duly certified to by me as United States marshal, and also certified to as such by W. W. Cotton, proctor for appellants.

ZOETH HOUSER,
*United States Marshal,*
By J. A. WILSON, *Deputy.*

(Endorsed:) Filed January 24, 1898. E. D. McKee, clerk.

1018 And afterwards, to wit, on Monday, the 24th day of January, 1898, the same being the 74th judicial day of the regular November term of said court—present, the Honorable Charles B. Bellinger, United States district judge, presiding—the following proceedings were had in said case, to wit:

In the District Court of the United States for the District of Oregon.

In the Matter of the Petition of the Oregon Railway and Navigation Company as the Owner of the Barge "Columbia" and the Oregon Short Line and Utah Northern Railway Company as Lessee Thereof to Limit Liability for Damage Done by the said Barge "Columbia."

*Order Allowing Appeal of Oregon Short Line and Utah Northern Railway Company from Decree of August 2, 1897, etc.*

Now, on this day, comes the Oregon Short Line and Utah Northern Railway Company, by Wirt Minor, of counsel, and presents to the court its petition praying for an order allowing an appeal by it to the United States circuit court of appeals for the ninth circuit from the decree heretofore entered in this cause on August 2, 1897, and moves the court to fix the amount of the cost bond to be given by it on such appeal; whereupon it is—

1019 Ordered that the prayer of the said petition be granted, and the said Oregon Short Line and Utah Northern Railway Company be, and it is hereby, allowed to take the appeal as prayed for therein upon giving a bond for costs in such appeal, with surety approved by the judge making this order, in the sum of five hundred dollars ($500.00).

CHARLES B. BELLINGER, *Judge.*

*Return.*

UNITED STATES OF AMERICA, }
*District of Oregon,* } *ss:*

I hereby certify that on the 25th day of January, 1898, at Portland, Multnomah county, Oregon, in said district, I duly served the within order upon E. B. Watson, proctor for Malvina Short, Sven Anderson, and Anna C. Larson, by delivering to him, personally, a true copy of said order duly certified to by me as United States marshal, and also certified to as such by E. D. McKee, clerk of the United States district court for the district of Oregon, and also duly certified to by Wirt Minor, or proctors for appellant.

ZOETH HOUSER,
*United States Marshal,*
By J. A. WILSON, *Deputy.*

(Endorsed:) Filed January 24, 1898. E. D. McKee, clerk.

1020 And afterwards, to wit, on the 24th day of January, 1898, there was duly filed in said court a bond on appeal of the Oregon Short Line and Utah Northern Railway Company from decree of August 2, 1897, in words and figures as follows, to wit:

In the District Court of the United States for the District of Oregon.

In the Matter of the Petition of the Oregon Railway and Navigation Company as the Owner of the Barge "Columbia" and the Oregon Short Line and Utah Northern Railway Company as Lessee Thereof to Limit Liability for Damage Done by the said Barge "Columbia."

*Bond on Appeal of Oregon Short Line and Utah Northern Railway Company from Decree of August 2, 1897.*

Know all men by these presents, that we, The Oregon Short Line and Utah Northern Railway Company and Henry Failing, are held and firmly bound unto Robert Balfour, Stephen Williamson, Alexander Guthrie, Robert Brodie Forman, R. Bruce, and Walter J. Burns, partners as Balfour, Guthrie & Co., and Malvina Short, administratrix of the estate of Marshal B. Short, deceased, and
1021 Sven Anderson, administrator of the estate of John August Peterson, deceased, in the um of five hundred dollars

($500.00), to be paid to the said Robert Balfour, Stephen Williamson, Alexander Guthrie, Robert Brodie Forman, R. Bruce, and Walter J. Burns, partners as Balfour, Guthrie & Co., and Malvina Short, administratrix of the estate of Marshal B. Short, deceased, and Sven Anderson, administrator of the estate of John August Peterson, deceased, for the payment of which, well and truly to be made, we bind ourselves, and each of us, and our and each of our heirs, executors, administrators, successors, and assigns, jointly and severally, firmly by these presents.

Signed with our seals and dated this 24th day of January, 1898.

Whereas, the above-named, The Oregon Short Line and Utah Northern Railway Company, prosecuted an appeal to the United States circuit court of appeals for the ninth circuit to reverse the decree rendered in the above-entitled proceeding by the district court of the United States for the district of Oregon, on August 2, 1897, in favor of the said Robert Balfour, Stephen Williamson, Alexander Guthrie, Robert Brodie Forman, R. Bruce, and Walter J. Burns, partners as Balfour, Guthrie & Co., and Malvina Short, administratrix of the estate of Marshal B. Short, deceased, and Sven Anderson, administrator of the estate of John August Peterson, deceased:

Now, therefore, the condition of this obligation is such that if the above-named, The Oregon Short Line and Utah Northern Railway Company shall prosecute said appeal to effect and answer all
1022 costs, if it shall fail to make said appeal good, then this obligation shall be void; otherwise to remain in full force and virtue.

THE OREGON SHORT LINE AND UTAH NORTHERN RAILWAY COMPANY,
By W. W. COTTON, *Its Proctor.*
HENRY FAILING. [SEAL.]

*Return.*

STATE OF OREGON, }
*County of Multnomah,* } *ss:*

I, Henry Failing, being first duly sworn, depose and say that I am a resident and householder within the district of Oregon, and am worth the sum of one thousand dollars ($1,000) over and above my just debts and liabilities, exclusive of property exempt from execution.

HENRY FAILING.

Subscribed and sworn to before me this 24th day of January, 1898.

[SEAL.] H. F. CONNER,
*Notary Public in and for Oregon.*

The above bond and surety thereto is hereby approved this 24th day of January, 1898.

CHARLES B. BELLINGER, *Judge.*

(Endorsed:) Filed January 24, 1898. E. D. McKee, clerk.
70—313

1023 And afterwards, to wit, on the 24th day of January, 1898, there was duly filed in said court a petition of the Oregon Railroad and Navigation Company for an appeal from decree of August 2, 1897, in words and figures as follows, to wit:

In the District Court of the United States for the District of Oregon.

In the Matter of the Petition of the Oregon Railway and Navigation Company as the Owner of the Barge "Columbia" and the Oregon Short Line and Utah Northern Railway Company as the Lessee Thereof to Limit Liability for Damage Done by the said Barge "Columbia."

*Petition of Oregon Railroad and Navigation Company for Appeal from Decree of August 2, 1897.*

The Oregon Railroad and Navigation Company conceives itself aggrieved by the decree entered by this court in the above-entitled proceeding on August 2, 1897, said decree being in favor of Robert Balfour, Stephen Williamson, Alexander Guthrie, Robert Brodie Forman, R. Bruce, and Walter J. Burns, partners as Balfour, Guthrie & Co., and in favor of Malvina Short, administratrix of the estate of Marshal B. Short, deceased, and Sven Anderson, adminis-
1024 trator of the estate of John August Peterson, deceased, and ordering and decreeing that the Oregon Railroad and Navigation Company pay into the registry of the above-entitled court, for distribution as provided in said decree, the sum of eighty-six hundred dollars ($8,600), and for costs as provided in said decree, and doth hereby appeal from the said decree to the United States circuit court of appeals for the ninth circuit, and prays that this its appeal may be allowed, and that the transcript of the record and proceedings and papers upon which said decree was made, duly authenticated, may be sent to the said United States circuit court of appeals for the ninth circuit, and appellant files herewith a separate and particular assignment of errors in said decree complained of by this appellant.

COX, COTTON, TEAL & MINOR,
*Proctors for the Appellant, The Oregon Railroad and Navigation Company.*

Service by copy admitted, at Portland, O'g'n, Jan. 24, 1898.

C. E. S. WOOD,
*Attorney for Balfour, Guthrie & Co.*

*Return.*

DISTRICT OF OREGON, }
*United States of America,* } *ss:*

I hereby certify that on the 24th day of January, 1898, at Portland, Multnomah county, in said district, I duly served the within

petition upon E. B. Watson, proctor for Malvina Short, Sven
1025 Anderson, and Anna C. Larson, by delivering to him, personally, a true copy of said petition, duly certified to by me as United States marshal, and duly certified to by W. W. Cotton, proctor for appellants.

ZOETH HOUSER,
*United States Marshal,*
By J. A. WILSON, *Deputy.*

(Endorsed:) Filed January 24, 1898. E. D. McKee, clerk.

And afterwards, to wit, on the 24th day of January, 1898, there was duly filed in said court an assignment of errors of the Oregon Railroad and Navigation Company on appeal from decree of August 2, 1897, in words and figures as follows, to wit:

In the District Court of the United States for the District of Oregon.

In the Matter of the Petition of the Oregon Railway and Navigation Company as the Owner of the Barge "Columbia" and the Oregon Short Line and Utah Northern Railway Company as Lessee Thereof to Limit Liability for Damage Done by the said Barge "Columbia."

1026 *Assignment of Errors of Oregon Railroad and Navigation Company on Appeal from Decree of August 2, 1897.*

Comes now the Oregon Railroad and Navigation Company and make this its assignment of errors on the appeal, taken by it in the above-entitled proceeding from the decree entered by the District court of the United States for the district of Oregon on August 2, 1897, and states that error was committed by the said court in the making of said decree in the above entitled cause, and in the proceedings prior thereto, in the following matters, to wit:

First. That the said district court had no jurisdiction under the mandate of the United States circuit court of appeals to enter any decree imposing any liability upon this appellant or the steamer "Ocklahama."

Second. The district court erred in entering the decree appealed from for the reason that the said appeal is not in accordance with the opinion of the United States circuit court of appeals in this proceeding on the former appeal, and is inconsistent therewith.

Third. The district court erred in seizing the steamer "Ocklahama," and in making the decree appealed from, for the reason that the seizure of the said "Ocklahama" was not required by the mandate of the United States circuit court of appeals, and was contrary to the said mandate, and the district court was without power or authority in this cause to issue process against the "Ocklahama," or to cause the "Ocklahama" to be seized.

Fourth. The district court erred in seizing the "Ocklahama," and in making said decree, for the reason that no libel *in rem* had, or has ever been, filed in this proceeding against the "Ocklahama."

1027

Fifth. The district court erred in seizing the "Ocklahama," and in entering the decree herein appealed from, for the reason that this proceeding was commenced by the Oregon Railway and Navigation Company and the Oregon Short Line and Utah Northern Railway Company to limit their personal liability, and was a suit *in personam*, and that the seizure of the said "Ocklahama" under the said decree entered herein changed the said proceeding *in personam* arising out of a collision into a proceeding *in rem*, and is contrary to the admiralty rules and practice of the Supreme Court of the United States.

Sixth. The district court erred in finding that Malvina Short, administratrix of the estate of Marshal B. Short, deceased, had sustained damage in the sum of five thousand dollars ($5,000), and in decreeing that said Malvina Short, as such administratrix, should have and recover said sum, or a portion thereof, from the Oregon Railroad and Navigation Company, claimant of the "Ocklahama," for the reason that it appears by the evidence and the findings of fact made by the district court on a former trial, and from the opinion of the United States circuit court of appeals in this cause, that any and all injuries received by the said Marshal B. Short were the result of his own contributory negligence.

Seventh. The district court erred in decreeing that Malvina Short, administratrix of the estate of Marshal B. Short, deceased, should have and recover the sum of five thousand dollars ($5,000), and in decreeing that the same, or any portion of the same, should be paid out of the fund represented by the bond given by the Oregon Railroad and Navigation Company, the claimant of the steamer "Ocklahama," for the reason that it appears from the evidence and the findings of fact, and from the opinion of the United States circuit court of appeals, that any and all injuries received by the said Marshal B. Short were the result of his negligence or that of his fellow-servants, and without any negligence on the part of this appellant, or the Oregon Short Line and Utah Northern Railway Company, or the Oregon Railway and Navigation Company, or the steamer "Ocklahama."

1028

Eighth. The district court erred in decreeing that Sven Anderson, administrator of the estate of John August Peterson, should have and recover the sum of three thousand dollars ($3,000), and decreeing that the same, or any part of the same, should be paid out of the fund represented by the bond given by the Oregon Railroad and Navigation Company, the claimant of the "Ocklahama," for the reason that it appears by the evidence and findings of fact, and the opinion of the United States circuit court of appeals, that any and all injuries received by the said John August Peterson were received as the result of negligence of his fellow-servants, and without any negligence on the part of this appellant or the Oregon Short Line and Utah Northern Railway Company, or the Oregon

Railway and Navigation Company, or the said steamer "Ocklahama."

Ninth. The district court erred in decreeing that the steamer
1029 "Ocklahama," or her value, should be surrendered in order that this appellant might limit its liability to the said Robert Balfour and others, and to the said Malvina Short, administratrix as aforesaid, and the said Sven Anderson, administrator as aforesaid, for the reason that there is no evidence showing that the towage services of the steamtug "Ocklahama" were not fully performed when the said barge "Columbia" was placed alongside of the dock at Astoria, but, on the contrary, the evidence shows that said services of the said "Ocklahama" were at the time of the alleged injuries to said persons, and each of them, fully performed.

Tenth. The district court erred in seizing the "Ocklahama," and in decreeing that the said "Ocklahama," or her value, should be surrendered in this proceeding, for the reason that if the Oregon Railway and Navigation Company or the Oregon Short Line and Utah Northern Railway Company, or both of them, were not entitled by reason of the filing of the petition initiating this proceeding, and by reason of the payment into court of the appraised value of the barge "Columbia," and of the matters and things done by the said petitioners to limit their liability, then, and in that event, it was the duty of the district court under the said mandate, and under the rules and practice in such cases made and provided, to have dismissed this proceeding, and have allowed the said Robert Balfour, and others, and the administratrix of the estate of Marshal B. Short, and the administrator of the estate of *Marshal B. Short, and the administrator of the estate of* John August Peterson, to have taken such remedy as they, or either of them, might have been ad-
1030 vised against the Oregon Railway and Navigation Company or the Oregon Short Line and Utah Northern Railway Company, or both, or to have confined the relief granted to the said Robert Balfour and others, and the said administratrix and administrator, to personal decrees and judgments against the Oregon Railway and Navigation Company or the Oregon Short Line and Utah Northern Railway Company, or both, as the court might have been advised under the evidence and findings of fact.

Eleventh. The district court erred in sustaining the exceptions of Robert Balfour and others to the answer of the Oregon Railroad and Navigation Company to the answer of the said Robert Balfour and others, said answer of the Oregon Railroad and Navigation Company being filed July 28, 1897; and erred in refusing to allow the Oregon Railroad and Navigation Company to introduce evidence in support of its said answer, and in depriving the said The Oregon Railroad and Navigation Company, as the claimant of the steamer "Ocklahama," of a trial upon the issues made by said answer.

Twelfth. The district court erred in sustaining the exceptions of Anna C. Larson, mother of John August Peterson, to the answer of the Oregon Railroad and Navigation Company to the answer of the said Anna C. Larson, mother of John August Peterson, said answer of the Oregon Railroad and Navigation Company being filed July

28, 1897; and erred in refusing to allow the Oregon Railroad and Navigation Company to introduce evidence in support of its said answer, and in depriving the said The Oregon Railroad and
1031 Navigation Company, as the claimant of the steamer "Ocklahama," of a trial upon the issues made by said answer.

Thirteenth. The district court erred in sustaining the exceptions of Sven Anderson, administrator of the estate of John August Peterson, deceased, to the answer of the Oregon Railroad and Navigation Company to the answer of the said Sven Anderson, administrator of the estate of John August Peterson, deceased, said answer of the Oregon Railroad and Navigation Company being filed July 28, 1897; and erred in refusing to allow the Oregon Railroad and Navigation Company to introduce evidence in support of its said answer, and in depriving the said The Oregon Railroad and Navigation Company, as the claimant of the steamer "Ocklahama," of a trial upon the issues made by said answer.

Fourteenth. The district court erred in sustaining the exceptions of Malvina Short, administratrix of the estate of Marshal B. Short, deceased, to the answer of the Oregon Railroad and Navigation Company to the answer of the said Malvina Short, administratrix of the estate of Marshal B. Short, deceased, said answer of the Oregon Railroad and Navigation Company being filed July 28, 1897; and erred in refusing to allow the Oregon Railroad and Navigation Company to introduce evidence in support of its said answer, and in depriving the said The Oregon Railroad and Navigation Company, as the claimant of the steamer "Ocklahama," of a trial upon the issues made by said answer.

Fifteenth. The district court erred in refusing to allow the Oregon Railroad and Navigation Company to introduce evidence in
1032 support of its several answers to the answer of Robert Balfour and others, and in depriving the Oregon Railroad and Navigation Company and the steamer "Ocklahama" of a trial upon the issues made by said answer and of its day in court.

Sixteenth. The district court erred in refusing to allow the Oregon Railroad and Navigation Company to introduce evidence in support of its several answers to the answer of Sven Anderson, administrator of the estate of John August Peterson, deceased, and in depriving the Oregon Railroad and Navigation Company and the steamer "Ocklahama" of a trial upon the issues made by said answer and of its day in court.

Seventeenth. The district court erred in refusing to allow the Oregon Railroad and Navigation Company to introduce evidence in support of its several answers to the answer of Malvina Short, administratrix of the estate of Marshal B. Short, deceased, and in depriving the Oregon Railroad and Navigation Company and the steamer "Ocklahama" of a trial on the issues made by said answer and of its day in court.

Eighteenth. The district court erred in decreeing that Robert Baifour and others had any interest in or lien upon the steamer "Ocklahama" as the result of any decree or proceedings had in this suit superior to the right, title, interest, and estate of this appellant

arising by reason of the purchase of the said steamer by this appellant, as the result of the foreclosure of the mortgage made by the Oregon Railway and Navigation Company to the Farmers' Loan and Trust Company, and referred to in the answer of this
1033 appellant to the answer of Robert Balfour and others, such answer of appellant being filed July 28, 1897.

Nineteenth. The district court erred in decreeing that Sven Anderson, administrator of the estate of John August Peterson, deceased, had any interest in or lien upon the steamer "Ocklahama" as the result of any decree or proceedings had in this suit superior to the right, title, interest, and estate of this appellant, arising by reason of the purchase of the said steamer by this appellant as the result of the foreclosure of the mortgage made by the Oregon Railway and Navigation Company to the Farmers' Loan and Trust Company, and referred to in the answer of this appellant to the answer of *Robert Balfour -swer of this appellant to the answer of* Sven Anderson, administrator of the estate of John August Peterson, deceased, such answer of appellant being filed July 28, 1897.

Twentieth. The district court erred in decreeing that Malvina Short, administratrix of the estate of Marshal B. Short, deceased, had any interest in or lien upon the steamer "Ocklahama" as the result of any decree or proceedings had in this suit superior to the right, title, interest, and estate of this appellant arising by reason of the purchase of the said steamer by this appellant, as the result of the foreclosure of the mortgage made by the Oregon Railway and Navigation Company to the Farmers' Loan and Trust Company, and referred to in the answer of this appellant to the answer of Malvina Short, administratrix of the estate of Marshal B. Short, deceased, such answer of appellant being filed July 28, 1897.

Twenty-first. The district court erred in decreeing that
1034 this appellant and its bondsman, J. G. Woodworth, or either of them, were liable for any portion of the services of the marshal's keeper of the said "Ocklahama" prior to September 30, 1896, and erred in decreeing that Robert Balfour and others, and Malvina Short, administratrix of the estate of Marshal B. Short as aforesaid, and Sven Anderson, as administrator of the estate of John August Peterson, deceased, as aforesaid, should have and recover any part of said fees against this appellant or against its bondsman, J. G. Woodworth, and erred in decreeing that execution should issue therefor.

COX, COTTON, TEAL & MINOR,
*Proctors for Appellant The Oregon Railroad and Navigation Company.*

Service by copy admitted at Portland, O'g'n, Jan. 24, 1898.

C. E. S. WOOD,
*Attorney for Balfour, Guthrie & Co.*

*Return.*

UNITED STATES OF AMERICA, } ss:
*District of Oregon,* }

I hereby certify that on the 24th day of January, 1898, at Portland, Multnomah county, Oregon, in said district, I duly served the within assignments of error upon E. B. Watson, proctor for Malvina Short, Sven Anderson, and Anna C. Larson, by delivering to him, personally, a true copy of said assignments of error, duly
1035 certified to by me as United States marshal, and also certified to as such by W. W. Cotton, proctor for appellants.

ZOETH HOUSER,
*United States Marshal,*
By J. A. WILSON, *Deputy.*

(Endorsed:) Filed January 24, 1898. E. D. McKee, clerk.

And afterwards, to wit, on Monday, the 24th day of January, 1898, the same being the 74th judicial day of the regular November term of said court—present, the Honorable Charles B. Bellinger, United States district judge, presiding—the following proceedings were had in said case, to wit:

In the District Court of the United States for the District of Oregon.

In the Matter of the Petition of the Oregon Railway and Navigation Company as the Owner of the Barge "Columbia" and the Oregon Short Line and Utah Northern Railway Company as Lessee Thereof to Limit Liability for Damage Done by the said Barge "Columbia."

*Order Allowing Oregon Railroad and Navigation Company to Appeal from Decree of August 2, 1897, etc.*

Now, on this day, comes the Oregon Railroad and Navigation Company, by Wirt Minor, of counsel, and presents in open court its petition praying for an order allowing an appeal by it to the
1036 United States circuit court of appeals for the ninth circuit from the decree heretofore entered in this cause on August 2, 1897, and prays the court to fix the amount of a bond intended to act and be a supersedeas of the said decree, to be given by it, the said The Oregon Railroad and Navigation Company, on such appeal; whereupon it is

Ordered that the prayer of the said petition be granted, and that the said The Oregon Railroad and Navigation Company be, and it is hereby, allowed to take the appeal as prayed for therein upon the giving of a bond for damages and costs in such appeal, with surety to be approved by the judge making this order, in the sum of fifteen hundred dollars ($1,500), and that said bond act as a supersedeas of the said decree.

CHARLES B. BELLINGER, *Judge.*

*Return.*

UNITED STATES OF AMERICA, } ss:
*District of Oregon,* }

I hereby certify that on the 25th day of January, 1898, at Portland, Multnomah county, Oregon, in said district I duly served the within order upon E. B. Watson, proctor for Malvina Short, Sven Anderson, and Anna C. Larson, by delivering to him, personally, a true copy of said order, duly certified to by me as United States marshal, and also certified to as such by E. D. McKee, clerk of
1037 the United States district court for the district of Oregon, and also duly certified to by Wirt Minor, of proctors for appellant.

ZOETH HOUSER,
*United States Marshal.*
By J. A. WILSON, *Deputy.*

(Endorsed:) Filed January 24, 1898. E. D. McKee, clerk.

And afterwards, to wit, on the 24th day of January, 1898, there was duly filed in said court a bond on appeal of the Oregon Railroad and Navigation Company from decree of August 2, 1897, in words and figures as follows, to wit:

In the District Court of the United States for the District of Oregon.

In the Matter of the Petition of the Oregon Railway and Navigation Company as the Owner of the Barge "Columbia" and the Oregon Short Line and Utah Northern Railway Company as Lessee Thereof to Limit Liability for Damage Done by the said Barge "Columbia."

1038 *Bond on Appeal of Oregon Railroad and Navigation Company from Decree of August 2, 1897.*

Know all men by these presents, that we, The Oregon Railroad and Navigation Company and Henry Failing, are held and firmly bound unto Robert Balfour, Stephen Williamson, Alexander Guthrie, Robert Brodie Forman, R. Bruce, and Walter J. Burns, partners as Balfour, Guthrie & Co., and Malvina Short, administratrix of the estate of Marshal B. Short, deceased, and Sven Anderson, administrator of the estate of John August Peterson, deceased, in the sum of fifteen hundred dollars ($1,500), to be paid to the said Robert Balfour, Stephen Williamson, Alexander Guthrie, Robert Brodie Forman, R. Bruce, and Walter J. Burns, partners as Balfour, Guthrie & Co., and Malvina Short, administratrix of the estate of Marshal B. Short, deceased, and Sven Anderson, administrator of the estate of John August Peterson, deceased, for the payment of which, well and truly to be made, we bind ourselves and each of us, and our and each of our heirs, executors, administrators, successors, and assigns, jointly and severally, firmly by these presents.

Signed with our seals and dated this 24th day of January, 1898.

Whereas, the above-named, The Oregon Railroad and Navigation Company, prosecuted an appeal to the United States circuit court of appeals for the ninth circuit to reverse the decree rendered in the above-entitled proceeding by the district court of the United States for the district of Oregon on August 2, 1897, in favor of the
1039 said Robert Balfour, Stephen Williamson, Alexander Guthrie, Robert Brodie Forman, R. Bruce, and Walter J. Burns, partners as Balfour, Guthrie & Co., and Malvina Short, administratrix of the estate of Marshal B. Short, deceased, and Sven Anderson, administrator of the estate of John August Peterson, deceased.

Now, therefore, the condition of this obligation is such that if the above-named, the said The Oregon Railroad and Navigation Company, shall prosecute said appeal to effect and answer all damages and costs if it shall fail to make said appeal good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

THE OREGON RAILROAD AND
NAVIGATION COMPANY,
By W. W. COTTON,
*Its General Attorney.*
HENRY FAILING. [SEAL.]

STATE OF OREGON,
*County of Multnomah,* } ss:

I, Henry Failing, being first duly sworn, depose and say that I am a resident and householder within the district of Oregon, and am worth the sum of three thousand dollars ($3,000) over and above my just debts and liabilities, exclusive of property exempt from execution.

HENRY FAILING.

Subscribed and sworn to before me this 24th day of January, 1898.

[SEAL.]
H. F. CONNER,
*Notary Public in and for Oregon.*

1040 The above bond and surety thereto is hereby approved this 24th day of January, 1898.

CHARLES B. BELLINGER, *Judge.*

(Endorsed:) Filed January 24, 1898. E. D. McKee, clerk.

And afterwards, to wit, on Monday, the 24th day of January, 1898, the same being the 74th judicial day of the regular November term of said court—present, the Honorable Charles B. Bellinger, United States district judge presiding—the following proceedings were had in said case, to wit:

In the District Court of the United States for the District of Oregon.

In the Matter of the Petition of the Oregon Railway and Navigation Company as the Owner of the Barge "Columbia" and the Oregon Short Line and Utah Northern Railway Company as Lessee Thereof to Limit Liability for Damage Done by the said Barge "Columbia."

*Order Extending Time to File Transcript of Record.*

1041 Upon application of the Oregon Railway and Navigation Company, as the owner of the barge "Columbia," and of the Oregon Short Line and Utah Northern Railway Company, as lessee thereof, to limit liability for damage done by the said barge "Columbia," and upon application of the Oregon Railroad and Navigation Company to extend the time within which to complete and file the record in this cause, upon the appeal to the circuit court of appeals for the ninth judicial circuit, to reverse the decree rendered in the above-entitled proceeding by the district court of the United States for the district of Oregon, and upon good cause being shown therefor, it is considered, ordered, adjudged, and decreed that the time within which the record shall be made and filed in the circuit court of appeals in the above-entitled cause be, and the same is hereby, extended until the 23d day of February, 1898.

Dated this 24th day of January, 1898.

CHARLES B. BELLINGER, *Judge.*

(Endorsed:) Filed January 24, 1898. E. D. McKee, clerk.

1042 And afterwards, to wit, on the 22d day of January, 1898, there was duly filed in said court a petition of Balfour, Guthrie & Company for appeal from decree of August 2, 1897, in words and figures as follows, to wit:

In the District Court of the United States for the District of Oregon.

In the Matter of the Petition of the Oregon Railway and Navigation Company as the Owners of the Barge "Columbia" and the Oregon Short Line and Utah Northern Railway Company as Lessee Thereof to Limit Liability for Damage Done by the said Barge "Columbia."

*Petition of Balfour, Guthrie & Co. for Appeal from Decree of August 2, 1897.*

Now come Robert Balfour, Stephen Williamson, Alexander Guthrie, Robert Brodie Forman, R. Bruce, and Walter J. Burns, partners as Balfour, Guthrie & Co., and pray this honorable court that they be allowed to appeal, and do hereby appeal, from so much of the decree entered by this court in the above-entitled cause on the second day of August, 1897, as allows any recovery, or awards

any damages, or distributes any portion of the fund in court
1043 in said cause to Malvina Short, administratrix of the estate of Marshal B. Short, deceased, and Sven Anderson, administrator of the estate of John August Peterson, deceased. And these appellants file herewith a separate and particular assignment of the errors in said decree complained of by these appellants.

And these appellants further pray that the clerk of this court be directed to prepare forthwith a transcript of the record in said cause, and to transmit the same without delay to the United States circuit court of appeals for the ninth circuit.

WILLIAMS, WOOD & LINTHICUM,
*Proctors for the said Robert Balfour, Stephen Williamson, et al., Partners as Balfour, Guthrie & Co., Appellants.*

Due service of the within petition by certified copy, as provided by law, is hereby admitted at Portland, Or., Jan. 21, 1898.

E. B. WATSON,
*Attorney for Malvina Short, Sven Anderson, Anna C. Larson.*
COX, COTTON, TEAL & MINOR,
*Proctors for O. S. L. & U. N. R'y Co., Oregon R'y & Nav. Co., and Oregon R. R. & Nav. Co.*

(Endorsed:) Filed January 22, 1898. E. D. McKee, clerk.

1044 And afterwards, to wit, on the 22d day of January, 1898, there *was* duly filed in said court assignments of errors on appeal of Balfour, Guthrie & Co. from decree of August 2, 1897, in words and figures as follows, to wit:

In the District Court of the United States for the District of Oregon.

In the Matter of the Petition of the Oregon Railway and Navigation Company as the Owner of the Barge "Columbia" and the Oregon Short Line and Utah Northern Railway Company as Lessee Thereof to Limit Liability for Damage Done by the said Barge "Columbia."

*Assignments of Error on Appeal of Balfour, Guthrie & Co. from Decree of August* 2, 1897.

Now comes Robert Balfour, Stephen Williamson, Alexander Guthrie, Robert Brodie Forman, R. Bruce, and Walter J. Burns, partners as Balfour, Guthrie & Co., and present to this honorable court this their assignment of errors on the appeal prayed for and taken by them in the above-entitled cause from so much of the decree entered by this court in said cause on the second day of August, 1897, as allows any recovery, or awards any damages
1045 or distributes any portion of the fund in court in said cause, to Malvina Short, administratrix of the estate of Marshal B. Short, deceased, or Sven Anderson, administrator of the estate of

John August Peterson, deceased. And thereupon these appellants allege and assign, and on said appeal will maintain, that error was committed by this court in said decree of the second day of August, 1897, as follows, to wit:

1. In finding and decreeing that Malvina Short, administratrix of the estate of Marshal B. Short, deceased, has sustained damages herein in the sum of five thousand dollars.

2. In finding and decreeing that Sven Anderson, administrator of the estate of John August Peterson, deceased, has sustained damages herein in the sum of three thousand dollars.

3. In decreeing that Malvina Short, administratrix as aforesaid, have and recover the sum of five thousand dollars.

4. In decreeing that Sven Anderson, administrator as aforesaid, have and recover the sum of three thousand dollars.

5. In decreeing and awarding to Malvina Short, administratrix as aforesaid, and Sven Anderson, administrator as aforesaid, their several costs and disbursements.

6. In decreeing that the sum in the registry of this court, after payment to these appellants, Balfour, Guthrie & Co., of their costs and disbursements, be distributed *pro rata* to the said Balfour, Guthrie & Co., Malvina Short, administratrix as aforesaid, and Sven Anderson, administrator as aforesaid.

1046 7. In not dismissing the libel of Malvina Short, administratrix as aforesaid, for the reason that any injury sustained by her or her said decedent was so sustained by reason of the contributory negligence of her said decedent.

8. In not dismissing the libel of Sven Anderson, administrator as aforesaid, for the reason that any injury sustained by him or his said decedent was so sustained by reason of the contributory negligence of his said decedent; and also for the further reason that said John August Peterson, deceased, was a fellow-servant with Marshal B. Short, the captain of the said barge "Columbia," whose negligence is established by the decree herein to have been the cause of the damage complained of by the said Sven Anderson, *administratrix*.

9. In not decreeing to these appellants, Balfour, Guthrie & Co., a prior and preferential distribution as to their damages claimed herein, as well as their costs and disbursements, over the said Malvina Short, administratrix, and the said Sven Anderson, administrator, and all other persons whatsoever.

WILLIAMS, WOOD & LINTHICUM,
*Proctors for the said Balfour, Guthrie & Co., Appellants.*

1047 Due service of the within petition by certified copy, as provided by law, is hereby admitted at Portland, Or., Jan. 21, 1898.

E. B. WATSON,
*Attorney for Malvina Short, Sven Anderson, Anna C. Larson.*
COX, COTTON, TEAL & MINOR,
*Proctors for O. S. L. & U. N. Co., Oregon R'y & Nav. Co., and Oregon R. R. & Nav. Co.*

(Endorsed:) Filed January 22, 1898. E. D. McKee, clerk.

And afterwards, to wit, on the 24th day of January, 1898, there was duly filed in said court a bond on appeal of Balfour, Guthrie & Co. from decree of August 2, 1897, in words and figures as follows, to wit:

In the District Court of the United States for the District of Oregon.

In the Matter of the Petition of the Oregon Railway and Navigation Company as the Owner of the Barge "Columbia" and the Oregon Short Line and Utah Northern Railway Company as Lessee Thereof to Limit Liability for Damage Done by the said Barge "Columbia."

1048 *Bond on Appeal of Balfour, Guthrie & Co. from Decree of August 2, 1897.*

Know all men by these presents, that we, Robert Balfour, Stephen Williamson, Alexander Guthrie, Robert Brodie Forman, R. Bruce, and Walter J. Burns, partners as Balfour, Guthrie & Co., as principals, and William Mackenzie, as surety, are held and firmly bound unto Malvina Short, administratrix of the estate of Marshal B. Short, deceased, Sven Anderson, administrator of the estate of John August Peterson, deceased, Anna C. Larson, the Oregon Railway and Navigation Company, E. McNeill, receiver of the Oregon Railway and Navigation Company, and the Oregon Railroad and Navigation Company in the sum of two hundred dollars, to be paid to them, their executors, administrators, or successors, to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals, and dated this 22d day of January, 1898.

Whereas, the above-bounded Robert Balfour, Stephen Williamson, Alexander Guthrie, Robert Brodie Forman, R. Bruce, and Walter J. Burns, partners as Balfour, Guthrie & Co., have prayed and taken an appeal to the United States circuit court of appeals for the ninth circuit, to reverse, correct, and modify the decree entered by the said district court of the United States for the district of Oregon in the above-entitled cause on the second day of August, 1897,

1049 in so far as the same allows any recovery or awards any damages or distributes any portion of the fund in court in said cause to the said Malvina Short, administratrix as aforesaid, or the said Sven Anderson, administrator as aforesaid:

Now, therefore, the condition of this obligation is such that if the above-named Robert Balfour and others, partners as Balfour, Guthrie & Co., shall prosecute said appeal to effect, and answer all costs, if they shall fail to make good their plea, then this obligation shall be void; otherwise to remain in full force and virtue.

BALFOUR, GUTHRIE & CO.,
By W. J. BURNS. [SEAL.]
WILLIAM MACKENZIE. [SEAL.]

Executed in the presence of—
E. R. JOHNS.
T. W. LONDON.

1050 UNITED STATES OF AMERICA, } ss:
*District of Oregon,* }

I, William Mackenzie, being duly sworn, depose and say that I am the surety in the foregoing bond; that I am a resident and freeholder within said district; and that I am worth in property situated therein the sum of five hundred dollars, over and above all my just debts and liabilities, and exclusive of property exempt from execution.

WILLIAM MACKENZIE.

Subscribed and sworn to before me, this 22d day of January, 1898.

[SEAL.]

T. W. LONDON,
*Notary Public in and for Oregon.*

Approved:

CHARLES B. BELLINGER, *Judge.*

(Endorsed:) Filed January 24, 1898. E. D. McKee, clerk.

1051 And, to wit, on the 22d day of January, 1898, there was duly filed in said court a petition of Balfour, Guthrie & Co. for appeal from decree of December 20, 1897, in words and figures as follows, to wit:

In the District Court of the United States for the District of Oregon.

In the Matter of the Petition of the Oregon Railway and Navigation Company as the Owners of the Barge "Columbia" and the Oregon Short Line and Utah Northern Railway Company as Lessee Thereof to Limit Liability for Damage Done by the said Barge "Columbia."

*Petition of Balfour, Guthrie & Co. for Appeal from Decree of December 20, 1897.*

Now come Robert Balfour, Stephen Williamson, Alexander Guthrie, Robert Brodie Forman, R. Bruce, and Walter J. Burns, partners as Balfour, Guthrie & Co., and pray this honorable court that they be allowed to appeal, and do hereby appeal, from so much of the decree entered by this court in the above-entitled cause on the 20th day of December, 1897 (upon the vacation and setting aside of the decree of this court entered in said cause on the

1052 second day of August, 1897), as allows any recovery or awards any damages or distributes any portion of the fund in court in said cause to Malvina Short, administratrix of the estate of Marshal B. Short, deceased, or Sven Anderson, administrator of the estate of John August Peterson, deceased. And these appellants file herewith a separate and particular assignment of the errors in said decree complained of by these appellants.

And these appellants further pray that the clerk of this court be directed to prepare forthwith a transcript of the record in said cause,

and to transmit the same without delay to the United States circuit court of appeals for the ninth circuit.

WILLIAMS, WOOD & LINTHICUM,
*Proctors for the said Robert Balfour, Stephen Williamson, et al., Partners as Balfour, Guthrie & Co., Appellants.*

Due service of the within petition by certified copy, as provided by law, is hereby admitted at Portland, Or., Jan. 21, 1898.

E. B. WATSON,
*Attorney for Malvina Short, Sven Anderson, Anna C. Larson.*
COX, COTTON, TEAL & MINOR,
*Proctors for O. S. L. & U. N. Co., Oregon R'y & Nav. Co., Oregon R. R. & Nav. Co.*

(Endorsed:) Filed January 22, 1898. E. D. McKee, clerk.

1053 And afterwards, to wit, on the 22d day of January, 1898, there was duly filed in said court an assignment of errors on appeal of Balfour, Guthrie & Co., from decree of December 20, 1897, in words and figures as follows, to wit:

In the District Court of the United States for the District of Oregon.

In the Matter of the Petition of the Oregon Railway and Navigation Company as the Owners of the Barge "Columbia" and the Oregon Short Line and Utah Northern Railway Company as Lessee Thereof to Limit Liability for Damage Done by the said Barge "Columbia."

*Assignment of Errors on Appeal of Balfour, Guthrie & Co. from Decree of December 20, 1897.*

Now come Robert Balfour, Stephen Williamson, Alexander Guthrie, Robert Brodie Forman, R. Bruce, and Walter J. Burns, partners as Balfour, Guthrie & Co., and present to this honorable court their assignment of errors on the appeal prayed for and taken by them in the above-entitled cause from so much of the decree entered by this court in said cause on the 20th day of December, 1897 (upon the vacation and setting aside of the decree of
1054 this court entered in said cause on the second day of August, 1897), as allows any recovery or awards any damages, or distributes any portion of the fund in court in said cause to Malvina Short, administratrix of the estate of Marshal B. Short, deceased, or Sven Anderson, administrator of the estate of John August Peterson, deceased. And thereupon these said appellants allege and assign, and on said appeal will maintain, that error was committed by this court in said decree of the 20th day of December, 1897, as follows, to wit:

1. In finding and decreeing that Malvina Short, administratrix of the estate of Marshal B. Short, deceased, has sustained damages herein in the sum of five thousand dollars.

2. In finding and decreeing that Sven Anderson, administrator of the estate of John August Peterson, deceased, has sustained damages herein in the sum of three thousand dollars.

3. In decreeing that Malvina Short, administratrix as aforesaid, have and recover the sum of five thousand dollars.

4. In decreeing that Sven Anderson, administrator as aforesaid, have and recover the sum of three thousand dollars.

5. In decreeing and awarding to Malvina Short, administratrix as aforesaid, and Sven Anderson, administrator as aforesaid, their several costs and disbursements.

6. In decreeing that the sum in the registry of this court, after payment to these appellants, Balfour, Guthrie & Co., of their costs and disbursements, be distributed *pro rata* to the said Bal-
1055 four, Guthrie & Co., Malvina Short, administratrix as aforesaid, and Sven Anderson, administrator as aforesaid.

7. In not dismissing the libel of Malvina Short, administratrix as aforesaid, for the reason that any injury sustained by her or her said decedent was so sustained by reason of the contributory negligence of her said decedent.

8. In not dismissing the libel of Sven Anderson, administrator as aforesaid, for the reason that any injury sustained by him or his said decedent was so sustained by reason of the contributory negligence of his said decedent; and also for the further reason that said John August Peterson, deceased, was a fellow-servant with Marshal B. Short, the captain of the said barge "Columbia," whose negligence is established by the former decree herein to have been the cause of the damage complained of by the said Sven Anderson, administrator.

9. In not decreeing to these appellants, Balfour, Guthrie & Co., a prior and preferential distribution as to their damages claimed herein, as well as their costs and disbursements, over the said Malvina Short, administratrix, and the said Sven Anderson, administrator, and all other persons whatsoever.

WILLIAMS, WOOD & LINTHICUM,
*Proctors for the said Robert Balfour et al.,*
*Partners as Balfour, Guthrie & Co., Appellants.*

1056 Due service of the within assignment of errors by certified copy, as provided by law, is hereby admitted at Portland, Or., Jan. 21, 1898.

E. B. WATSON,
*Attorney for Malvina Short, Sven Anderson, and Anna C. Larson.*

COX, COTTON, TEAL & MINOR,
*Proctors for O. S. L. & U. N. R'y Co., Oregon R'y & Nav. Co., Oregon R. R. & Nav. Co.*

(Endorsed:) Filed January 22, 1898. E. D. McKee, clerk.

And afterwards, to wit, on the 24th day of January, 1898, there was duly filed in said court a bond on appeal of Balfour, Guthrie &

Co. from decree of December 20, 1897, in words and figures as follows, to wit:

In the District Court of the United States for the District of Oregon.

In the Matter of the Petition of the Oregon Railway and Navigation Company as the Owner of the Barge "Columbia" and the Oregon Short Line and Utah Northern Railway Company as Lessee Thereof to Limit Liability for Damage Done by the said Barge "Columbia."

1057 *Bond on Appeal of Balfour, Guthrie & Co. from Decree of December 20, 1897.*

Know all men by these presents that we, Robert Balfour, Stephen Williamson, Alexander Guthrie, Robert Brodie Forman, R. Bruce, and Walter J. Burns, partners as Balfour, Guthrie & Co., as principals, and William Mackenzie, as surety, are held and firmly bound unto Malvina Short, administratrix of the estate of Marshal B. Short, deceased; Sven Anderson, administrator of the estate of John August Peterson, deceased; Anna C. Larson, the Oregon Railway and Navigation Company; E. McNeill, receiver of the Oregon Railway and Navigation Company, and the Oregon Railroad and Navigation Company, in the sum of five hundred dollars, to be paid to them, their executors, administrators, or successors; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this 22d day of January, 1898.

Whereas the above-bounden Robert Balfour, Stephen Williamson, Alexander Guthrie, Robert Brodie Forman, R. Bruce, and Walter J. Burns, partners as Balfour, Guthrie & Co., have prayed and taken an appeal to the United States circuit court of appeals for the ninth circuit to reverse, correct, and modify the decree entered by said district court of the United States for the district of Oregon
1058 in the above-entitled cause on the 20th day of December, 1897, in so far as the same allows any recovery or awards any damages or distributes any portion of the fund in court in said cause to the said Malvina Short, administratrix as aforesaid, or the said Sven Anderson, administrator as aforesaid:

Now, therefore, the condition of this obligation is such, that if the above-named Robert Balfour and others, partners as Balfour, Guthrie & Co., shall prosecute said appeal to effect, and answer all costs, if they shall fail to make good their plea, then this obligation shall be void; otherwise to remain in full force and virtue.

BALFOUR, GUTHRIE & CO.,
By W. J. BURNS. [SEAL.]
WILLIAM MACKENZIE. [SEAL.]

Executed in the presence of:
E. R. JOHNS.
T. W. LONDON.

UNITED STATES OF AMERICA, } ss:
*District of Oregon,* }

I, William Mackenzie, being duly sworn, depose and say that I am the surety in the foregoing bond; that I am a resident and freeholder within said district; and that I am worth, in property situated therein, the sum of five hundred dollars, over and above all my just debts and liabilities, and exclusive of property exempt from execution.

WILLIAM MACKENZIE.

1059 Subscribed and sworn to before me this 22d day of January, 1898.

[SEAL.]

T. W. LONDON,
*Notary Public in and for Oregon.*

Approved.

CHARLES B. BELLINGER, *Judge.*

(Endorsed:) Filed January 24, 1898. E. D. McKee, clerk.

And, to wit, on Saturday, the 22d day of January, 1898, the same being the 73d judicial day of the regular November term of said court—present, the Honorable Charles B. Bellinger, United States district judge, presiding—the following proceedings were had in said case, to wit:

In the District Court of the United States for the District of Oregon.

In the Matter of the Petition of the Oregon Railway and Navigation Company as the Owner of the Barge "Columbia" and the Oregon Short Line and Utah Northern Railway Company as Lessee Thereof to Limit Liability for Damage Done by the said Barge "Columbia." No. 3163.

1060 *Order Allowing Appeal of Balfour, Guthrie & Co. from Decrees of August* 2, 1897, *and December* 20, 1867.

JAN. 22, 1898.

Now, at this day, comes the respondents herein, Balfour, Guthrie and Company, by Mr. C. E. S. Wood, of counsel, and present to the court their several petitions for the allowance of an appeal from the several respective decrees entered herein on the second day of August, 1897, and the twentieth day of December, 1897; and it appearing that assignments of error have been duly filed with each several appeal, it is ordered that each of said several appeals be, and the same is hereby, allowed; and it is further ordered that the amount of the bonds on each of said appeal- be, and the same is hereby, fixed at five hundred dollars.

CHARLES B. BELLINGER, *Judge.*

(Endorsed:) Filed January 22, 1898. E. D. McKee, clerk.

1061 And afterwards, to wit, on Thursday, the 3d day of February, 1898, the same being the 82d judicial day of the regular *Thursday* term of said court—present, the Honorable Charles B. Bellinger, United States district judge, presiding—the followings proceedings were had in said case, to wit:

In the District Court of the United States for the District of Oregon.

In the Matter of the Petition of the Oregon Railway and Navigation Company as the Owner of the Barge "Columbia" and the Oregon Short Line and Utah Northern Railway Company as Lessee Thereof—to Limit Liability for Damage Done by the said Barge "Columbia."

*Order Extending Time to File Transcript of Record.*

Upon the application of the Oregon Railway and Navigation Company and of the Oregon Short Line and Utah Northern Railway Company, and upon the application of the Oregon Railroad and Navigation Company for the entry of an order extending the time within which to complete and file the record in this cause in the United States circuit court of appeals for the ninth judicial
1062 circuit, upon the appeals taken by said parties to the circuit court of appeals for the ninth judicial circuit to reverse the decree rendered in the above-entitled proceeding on December 20th, 1897, upon the vacation and setting aside of the decree entered therein on August 2d, 1897, in favor of Robert Balfour, Stephen Williamson, Alexander Guthrie, Robert Brodie Foreman, R. Bruce, and Walter J. Burns, partners as Balfour, Guthrie & Co., and Malvina Short, administratrix of the estate of Marshal B. Short, deceased, and Sven Anderson, administrator of the estate of John August Peterson, deceased, by the district court of the United States for the district of Oregon, and upon good cause being shown,

It is now considered, ordered, adjudged, and decreed that the time within which to file in the circuit court of appeals for the ninth judicial circuit the record on the appeals of the Oregon Railway and Navigation Company, the Oregon Railroad and Navigation Company, and the Oregon Short Line and Utah Northern Railway Company to the circuit court of appeals for the ninth judicial circuit, to reverse the decree made and entered in the above-entitled matter by the district court of the United States for the district of Oregon, on the 20th day of December, 1897, upon the vacation and setting aside of the decree entered therein on August 2d, 1897, be, and the same is hereby, extended until the 23d day of February, 1898.

Dated this 3d day of February, 1898.

(Signed) CHARLES B. BELLINGER, *Judge.*

1063 And afterwards, to wit, on the 12th day of February, 1898, there was duly filed in said court a stipulation as to the record on the several appeals in words and figures as follows, to wit:

In the District Court of the United States for the District of Oregon.

In the Matter of the Petition of the Oregon Railway and Navigation Company as the Owner of the Barge "Columbia" and the Oregon Short Line and Utah Northern Railway Company as Lessee Thereof to Limit Liability for Damage Done by the said Barge "Columbia."

*Stipulation as to Record on the Several Appeals.*

It is stipulated by and between the Oregon Railway and Navigation Company, the Oregon Railroad and Navigation Company, the Oregon Short Line and Utah Northern Railway Company, Edwin McNeill, receiver, Malvina Short, administratrix, Sven Anderson, administrator, Anna C. Larson, and Robert Balfour *et al.*, partners doing business as Balfour, Guthrie & Co., that but one record need be prepared and certified to the circuit court of appeals for
1064 the ninth circuit in the several appeals taken by the Oregon Railway and Navigation Company, the Oregon Railroad and Navigation Company, the Oregon Short Line and Utah Northern Railway Company and Robert Balfour *et al.*, partners doing business as Balfour, Guthrie & Co., from the decrees in this cause rendered, and that said record shall consist of the mandate and of all proceedings had in this cause since the filing of said mandate, and that in each of said appeals the said record may be referred to, used, and considered in all respects as if said record had been certified in each of said appeals.

It is distinctly understood, however, that this stipulation shall not be construed to waive any right or cure any error that may exist in favor of or against any of the parties herein, it being the intention of this stipulation to avoid the preparation of practically duplicate records in the appeals hereinbefore referred to.

Dated at Portland, Oregon, February 10, 1898.

COX, COTTON, TEAL & MINOR,
*Proctors for the Oregon Railway and Navigation Company, the Oregon Railroad and Navigation Company, the Oregon Short Line and Utah Northern Railway Company, and Edwin McNeill, Receiver.*

E. B. WATSON,
*Proctor for Malvina Short, Sven Anderson, and Anna C. Larson.*

WILLIAMS, WOOD & LINTHICUM,
*Proctors for Balfour, Guthrie & Co.*

(Endorsed:) Filed February 12, 1898. E. D. McKee, clerk.

1065 *Clerk's Certificate to Transcript.*

UNITED STATES OF AMERICA, } ss:
*District of Oregon,* }

I, E. D. McKee, clerk of the district court of the United States for the district of Oregon, by virtue of the several orders allowing ap-

peals of the Oregon Railway and Navigation Company, the Oregon Short Line and Utah Northern Railway Company, and the Oregon Railroad and Navigation Company, and Balfour, Guthrie & Company, from the several decrees entered, respectively, on August 2, 1897, and December 20, 1897, and in accordance with the stipulation of the parties filed herein, do hereby certify that the foregoing pages, numbered from 34 to 353, inclusive, contain a full, true, and complete transcript of the record and proceedings in said court since the filing of the mandate of the United States circuit court of appeals for the ninth circuit, as the same appears of record and on file at my office.

And I further certify that the cost of the foregoing transcript is one hundred and forty-eight $\frac{50}{100}$ dollars, paid by the Oregon Railroad and Navigation Company, and eight $\frac{40}{100}$ dollars paid by Balfour, Guthrie & Company.

In testimony whereof I have caused the seal of the said district court to be hereunto affixed at Portland, in said district, this 14th day of February, 1898.

[SEAL.]

E. D. McKEE,
*Clerk United States District Court, District of Oregon,*
By G. H. MARSH,
*Deputy Clerk.*

1066 (Endorsed:) No. 435. In the United States circuit court of appeals for the ninth circuit. Oregon Railroad and Navigation Company, The Oregon Railway and Navigation Company, and The Oregon Short Line and Utah Northern Railway Company, appellants, *v.* Robert Balfour *et al.*, partners, doing business as Balfour, Guthrie & Co.; Malvina Short, administratrix of Marshal B. Short, deceased; Sven Anderson, administrator of John August Peterson and Anna C. Larson, deceased, appellees. Robert Balfour *et al.*, doing business as Balfour, Guthrie & Co., appellants, *v.* The Oregon Railroad and Navigation Company, The Oregon Railway and Navigation Company, The Oregon Short Line and Utah Northern Railway Company; Malvina Short, administratrix of Marshall B. Short, deceased; Sven Anderson, administrator of John August Peterson and Anna C. Larson, deceased, appellees. Transcript of record. Appeal from the district court of the United States for the district of Oregon. Filed February 16, 1898. F. D. Monckton, clerk.

1067 At a stated term, to wit, the October term, A. D. 1897, of the United States circuit court of appeals for the ninth circuit, held at the court-room, in the city and county of San Francisco, on Wednesday, the eleventh day of May, in the year of our Lord one thousand eight hundred and ninety-eight.

Present: The Honorable William B. Gilbert, circuit judge; Honorable Erskine M. Ross, circuit judge; Honorable William W. Morrow, circuit judge.

OREGON RAILROAD AND NAVIGATION COMPANY ET AL., Appellants,
*v.*
ROBERT BALFOUR ET AL.,
and
ROBERT BALFOUR ET AL., Appellants,
*v.*
OREGON RAILROAD AND NAVIGATION COMPANY ET AL.
No. 435.

Ordered appeals argued by W. W. Cotton and C. E. S. Wood and Nathan H. Frank, Esquires, and submitted to the court for consideration and decision.

1068 In the United States Circuit Court of Appeals for the Ninth Circuit.

THE OREGON RAILROAD AND NAVIGATION COMPANY, THE OREGON Railway and Navigation Company, and The Oregon Short Line and Utah Northern Railway Company, Appellants,
*vs.*
ROBERT BALFOUR ET AL., Partners, Doing Business as Balfour, Guthrie & Company; Malvina Short, Administratrix of the Estate of Marshal B. Short, Deceased; Sven Anderson, Administrator of the Estate of John August Petersen, Deceased, and Anna C. Larsen, Mother of John August Petersen, Deceased, Appellees.

C. E. S. Wood for Balfour, Guthrie & Company.
W. W. Cotton for the Oregon Railroad & Navigation Company, the Oregon Railway & Navigation Company, and the Oregon Short Line and Utah Northern Railway Company.
Andros & Frank for Malvina Short and Sven Anderson.

Before Gilbert, Ross, and Morrow, circuit judges.

GILBERT, *Circuit Judge:*

This is the second appeal of this case. In October, 1892, the steam towboat Ocklahama had the barge Columbia in tow
1069 at a wharf in Astoria, Oregon. There was a collision against the wharf, and the barge sank, damaging wheat belonging to Balfour, Guthrie & Company valued at $18,000 and killing Marshal Short, the captain, and John August Petersen, a deck hand, of the Ocklahama. The barge and the towboat were the property of the Oregon Railway & Navigation Company, but were leased, with the other property of said company, to the Oregon Short Line & Utah Northern Railway Company for a term of ninety-nine years. Balfour, Guthrie & Company instituted a libel *in personam* against the corporations to recover for their loss, and the representatives of Short and Petersen were about to bring suits

to recover for the death of their intestates. The two corporations then joined in a petition in the admiralty court to limit their liability, under the provisions of secs. 4283, 4284 of the Revised Statutes, and prayed for an injunction against all proceedings against them or said vessels. At the same time the petitioners surrendered the appraised value of the barge Columbia in the sum of $100 and sought by their petition to limit their liability to that amount. The court so decreed, but on appeal to this court it was held that the petitioners should have surrendered the towboat Ocklahama, and that, so far as the liability was concerned, the tug and the tow constituted but one vessel. A mandate was issued from this court directing further proceedings in the court below in accordance with the said ruling. At the time of the collision and at the time of instituting the proceedings to limit their liability both corporations were solvent, but by the time when the mandate from this court was entered in the circuit court they had both become insolvent and had gone into the hands of receivers. Application was made to the district court on behalf of Balfour, Guthrie & Company for an order directing that the receiver of the Oregon Railway &
1070 Navigation Company be made a party to the proceedings, but the court denied the order and declined to allow the receiver to be made a party or to declare him a trustee under section 4285 of the statute creating limitation of liability. The court ordered, however, that Balfour, Guthrie & Company have leave to seize the Ocklahama. Application was then made to the court for leave to issue an order of seizure, in the nature of an order of sequestration, to bring the Ocklahama into court. This order was denied, the court holding that no particular order was necessary to warrant the marshal to seize the vessel. The Ocklahama was then seized under the regular process of the court. She was appraised at $8,600, for which sum the Oregon Railroad & Navigation Company, the successor in interest of the Oregon Railway & Navigation Company, gave a bond and obtained possession of the vessel. The Oregon Railroad & Navigation Company then made application to be allowed to appear and contest the question of the liability of said vessels for the injury, contending that it was a *bona fide* purchaser of the Ocklahama from the railway company, and that it had never had its day in court, and that the question of the liability of said vessels for the injury was still open to adjudication. The court denied this application, proceeded to adjudge the injuries to the appellees in this case, fixed the same at the total sum of $24,018.79, and ordered the application of the fund in court to the payment *pro rata* of said claims. On appeal to this court the appellants, The Oregon Railway & Navigation Company and The Oregon Railroad & Navigation Company, now contend, first, that the district court had no power under the mandate of this court to enter any decree imposing any liability upon the Oregon Railroad & Navigation Company or the steamer Ocklahama, and that the decree appealed from is
1071 not in accordance with the opinion of this court; second, that under the mandate of this court the district court was without authority to issue process against the Ocklahama or to

cause her seizure; third, that the district court erred in seizing said vessel for the reason that no libel *in rem* had been filed against her; fourth, that the court erred in seizing said vessel and in entering the decree appealed from for the reason that the suit was commenced to limit the personal liability of the Oregon Railway & Navigation Company and the Oregon Short Line & Utah Northern Railway Company and was a suit *in personam*, and that by the seizure of the vessel it had been changed to a suit *in rem*, which is contrary to the admiralty rules; fifth, that if the petitioners in the suit to limit liability were not entitled to the relief they prayed for by virtue of having surrendered the barge Columbia, then it was the duty of the district court under the mandate of this court to have dismissed the proceeding and to have permitted the appellees to adopt such remedies as they might have deemed proper against both or either of said corporations, or to have confined the relief granted to said appellees to personal decrees and judgment against said two corporations or either thereof; sixth, that the court erred in not permitting the Oregon Railroad & Navigation Company to defend and in refusing to permit it to introduce evidence and in depriving it as claimant of the Ocklahama without a trial; seventh, that the court erred in decreeing that the appellees in this case had any interest in the Ocklahama superior to the right of the said Oregon Railroad & Navigation Company, acquired by purchasing the steamer at the foreclosure of the mortgage made by the Oregon Railway & Navigation Company to the Farmers' Loan & Trust Company; eighth, that the court erred in finding that
1072 Malvina Short and Sven Anderson should recover any sum whatever, since it appears from the evidence and the findings of fact that the injuries which their intestates received were the result of their own negligence or that of their fellow-servants; ninth, that the court erred in making any decree against the Ocklahama or her present owner for the reason that there is no evidence that the towage services which she rendered were not fully performed and completed at the time when the injury occurred. Balfour, Guthrie & Company appeal from that portion of the decree which awards a portion of the fund in court to the representatives of Short and Petersen, contending that the said Short and Petersen came to their death through the negligence of Ferguson, the master of the barge, who was their fellow-servant.

In considering these questions it becomes necessary to refer to the nature of the proceeding to limit liability which is contemplated by the statute. The statute provides for "appropriate proceedings in any court." It has been held that inasmuch as Congress did not invest the circuit courts of the United States with jurisdiction of such cases by a bill in equity and the State courts have not the requisite jurisdiction, the district courts of the United States, since they have admiralty jurisdiction, are best adapted to distribute the precise relief which the statute provides for. Norwich Company *v.* Wright, 13 Wall., 104. *In re* Morrison, petitioner, 147 U. S., 14, it was held that "the proceeding to limit liability is not an action against the vessel and her freight, except when they are surrendered

to a trustee, but is an equitable action." In Providence and N. Y. S. S. Co. *v.* Hill Mfg. Co., 109 U. S., 578, it was said that the object and scheme of the statute are to prevent a multiplicity of
1073 suits. The proceeding, therefore, is a suit in equity in admiralty, not to subject property to liens nor to obtain a personal decree against the owners of the property, but to administer the property which has been invested in the venture through which the injury has occurred and upon which admiralty liens may have attached therefor and to apportion it among those who might, on account of the injury, have enforced such liens against the property or have obtained personal judgments against its owner. To accomplish these results and to avoid the dilemma of inferring that Congress has passed a law which is incapable of execution it must be held that the powers of the admiralty court in such equitable proceeding are as extensive and its remedies are as effective as are the powers and remedies of a court of chancery where its jurisdiction is invoked in an equitable proceeding. In Norwich Company *v.* Wright, above cited, it was said: "If the ship owner desires the intervention of the court it will not be sufficient for him simply to ask for a *pro rata* reduction of the libelants' damages without in some manner tendering the corresponding *pro rata* compensation to which other parties, whose claims he sets up against the libelants, are entitled. Otherwise he might reduce the libelants' claim without ever being obliged to respond to the other parties." Here was announced a principle of equity which, by the former decision of this court (73 Fed., 226), was applied to the present case. We there held that the owners and lessees of the Ocklahama and the Columbia could not limit their liability by simply surrendering one of the offending vessels, but were required to surrender both, and the cause was remanded for further proceeding in accordance with that view. It is not necessary here to reconsider any of the questions determined on the former appeal.

It was held that the court could not proceed without the
1074 possession of the fund to which the liability was limited. The cause being remanded for that purpose, what were the necessary steps to be taken? Was the petition to be dismissed unless the petitioners should, of their own motion, surrender the Ocklahama, or was it proper for the court to retain jurisdiction of the case, since its jurisdiction had once been invoked by the petitioners, and to obtain, by its own process or upon its own order, the possession of the vessel, which should have been surrendered in the first instance, and which the petitioners still declined to surrender? We have no doubt that the latter proceeding was the proper one. The jurisdiction of the district court, in admiralty, in this equitable proceeding, had been invoked for the purpose of limiting the liability of the petitioners and adjusting all claims. As the result of filing the petition, all proceedings against the vessels and their owners were stayed. The petitioners voluntarily submitted themselves to the jurisdiction of the court and asked the court to pass upon the question of their limited liability. They set forth the facts out of which that liability arose. They mentioned and de-

scribed the Ocklahama and her connection with the accident. It is true they denied that she was liable for the injury, but issue was taken upon this allegation by the appellees, Balfour, Guthrie & Company. They alleged that the Ocklahama was liable and asked the court to bring her in. The court proceeded to adjudge the damages and to apportion to the payment thereof the small fund which represented the value of the Columbia. When the case went back on the mandate from this court the Ocklahama was in the possession of the receiver. The appellees applied to the court for an order to make the receiver a party to the suit. This was denied, the court ruling that the
1075 receiver was not a necessary party. The petitioners did not ask the court to dismiss the suit or to dissolve the injunction. They were still before the court with their petition and praying for the relief which the petition asked for. The appellees were in court with their answers, setting up their claims and demanding judgments therefor, denying the right of the petitioners to limit their liability to the barge and demanding the surrender of the Ocklahama. It would be paying but little regard to the statute and the decisions which have interpreted it to say that in this equitable proceeding the court shall not have the power to require the petitioners to do equity. Said Mr. Justice Bradley in The Benefactor, 103 U. S., 239, "The flexibility of admiralty proceedings will enable the court in most cases to shape their course so as to attain justice between the parties." But for the interference of the court in the equitable proceeding the appellees in this case would have had their recourse against both the vessels and their owners and might long since have enforced their claims to the full extent of the damages which they sustained. By appealing to the equitable jurisdiction granted to the admiralty court the petitioners have procured a stay of such proceedings. A long period of time has elapsed. The appellees have not now the facility that they then had to produce evidence of the facts. The petitioners have become insolvent. Their assets have been sold upon foreclosure of mortgages. They have nothing now wherewith to meet the demands arising out of the accident. Such an interpretation of the statute renders it nugatory and deprives the court of the jurisdiction which it was evidently the intention of Congress to bestow upon it. Nor is it im-
1076 portant here to determine whether upon the refusal of the petitioners to surrender her the district court could rightfully obtain jurisdiction of the Ocklahama by virtue of its process, or whether the vessel should have been brought into court by an order of sequestration or by other means. The fact remains that the Ocklahama was brought into court; that her owner appeared and stipulated to pay her appraised value; that thereby the fund which the court was called upon by the petitioners to administer in case it should limit their liability was placed in the possession of the court. The method by which it was obtained, inasmuch as it does not involve any substantial right of the appellants, it is not necessary for the court now to review.

It is insisted that the Oregon Railroad & Navigation Company, the present owner of the Ocklahama, has not had its day in court,

and that it is an innocent purchaser of the vessel and took her upon foreclosure of a mortgage against the property of the Oregon Railway & Navigation Company and without notice of any admiralty lien affecting her. The Oregon Railroad and Navigation Company is the Oregon Railway and Navigation Company reorganized, with its name changed from a "way" to a "road." It has the same property, does business at the same places, is conducted by the same officers, and is represented by the same attorneys. The attorneys who are now before the court on behalf of the appellants were the attorneys for the petitioners at the commencement of the proceeding and were subsequently the attorneys for the receiver of the Oregon Railway & Navigation Company. Notice to a corporation can only be effected by notice to its officers and agents, and it is absurd to say that the reorganized corporation is a purchaser
1077 without notice. It had notice of the accident out of which the present litigation arose, of the participation of the Ocklahama therein, of the lien with which she was chargeable therefor in admiralty, and of the proceedings which were brought to limit that liability. When the Oregon Railroad and Navigation Company appeared in the district court in the proceedings subsequent to the mandate from this court it attempted to litigate a matter which was already adjudicated, to which its predecessor in interest had been a party, and by which it, as successor, was bound. It acquired the Ocklahama subject to the admiralty lien which had attached to it.

The question whether or not Short and Anderson are barred of all right to recover damages for the death of their intestates by reason of the fact that the accident occurred through the negligence of a fellow-servant is one that does not affect the substantial rights of the railroad companies. The total amount of the fund in court is insufficient to meet the damages which the court has found were sustained by Balfour, Guthrie & Company. If there was error in awarding a portion of it to Short and Anderson, the amount awarded to them should have been paid to Balfour, Guthrie & Company. The disposition of the fund is a matter which does not concern the other parties to the suit. On the first appeal to this court Balfour, Guthrie & Company, while appealing from the decree, did not appeal from and sought in no manner to attack that portion thereof which awarded damages to Short and Anderson. No suggestion was made in the pleadings before the original decree that Short and Anderson were not entitled to recover by reason of the fact that Ferguson, whose negligence caused the accident, was the fellow-servant of their intestates. In the proceedings upon the mandate Balfour, Guthrie & Company did not file supplemental pleadings making such
1078 a defense, nor did they ask leave to do so. After the mandate no further evidence was taken. Balfour, Guthrie & Company now appeal, not from the action of the court in fixing the amount which Short and Anderson are to receive, but from the finding that they are entitled to recover in any sum whatever. That question has been adjudicated by the former decree, and we think the question of the right of Short and Anderson to participate in the

fund is not now open for consideration. The Lady Pike, 96 U. S., 461; Supervisors *v.* Kennicott, 94 U. S., 498; Sibbald *v.* United States, 12 Peters, 488; Santa Maria, 10 Wheaton, 431; Roberts *v.* Cooper, 20 Howard, 466. We find no error for which the decree should be reversed. It will therefore be affirmed, with costs to the appellees.

(Endorsed:) Opinion. Filed Oct. 3, 1898. Frank D. Monckton, clerk, by Meredith Sawyer, deputy clerk.

1079 United States Circuit Court of Appeals for the Ninth Circuit, October Term, 1898.

OREGON RAILROAD AND NAVIGATION COMPANY ET AL., Appellants,
*v.*
ROBERT BALFOUR ET AL., Appellees,
and
ROBERT BALFOUR ET AL., Appellants,
*v.*
OREGON RAILROAD AND NAVIGATION COMPANY ET AL., Appellees.
} No. 435.

Appeal from the district court of the United States for the district of Oregon.

This cause came on to be heard on the transcript of the record from the district court of the United States for the district of Oregon and was argued by counsel.

On consideration whereof it is now here ordered, adjudged, and decreed by this court that the decree of the said district court in this cause be, and the same is hereby, affirmed, with costs to the appellees.

(Endorsed:) Decree. Filed Oct. 3, 1898. F. D. Monckton, clerk.

1080 At a stated term, to wit, the October term, A. D. 1898, of the United States circuit court of appeals for the ninth circuit, held at the court-room, in the city and county of San Francisco, on Monday, the seventeenth day of October, in the year of our Lord one thousand eight hundred and ninety-eight.

Present: The Honorable William B. Gilbert, circuit judge; Honorable Erskine M. Ross, circuit judge; Honorable Thomas P. Hawley, district judge.

OREGON RAILROAD AND NAVIGATION COMPANY ET AL., Appellants,
*v.*
ROBERT BALFOUR ET AL.,

and

ROBERT BALFOUR ET AL., Appellants,
*v.*
OREGON RAILROAD AND NAVIGATION COMPANY ET AL.

No. 435.

On motion of Aylett R. Cotton, Esquire, for W. W. Cotton, Esquire, ordered mandate herein stayed fifteen days, in addition to time limited by rule 32 of this court, with leave to file a petition for a rehearing within the time so extended.

1081 Endorsed: 435. In the United States circuit court of appeals for the ninth circuit. The Oregon Railroad & Navigation Company, The Oregon Railway & Navigation Company, and The Oregon Short Line & Utah Northern Railway Company, appellants, *v.* Robert Balfour *et al.*, partners, doing business as Balfour, Guthrie & Co.; Malvina Short, administratrix of the estate of Marshal B. Short, deceased; Sven Anderson, administrator of the estate of John August Peterson, deceased, and Anna C. Larson, mother of John August Peterson, deceased, appellees. Petition for rehearing and brief of appellants. Appeal from the district court of the United States for the district of Oregon. Cotton, Teal & Minor, proctors for appellants. Filed Oct. 31, 1898. F. D. Monckton, clerk.

1082 In the United States Circuit Court of Appeals for the Ninth Circuit.

THE OREGON RAILROAD & NAVIGATION COMPANY, THE OREGON Railway & Navigation Company, and The Oregon Short Line & Utah Northern Railway Company, Appellants,
*v.*
ROBERT BALFOUR ET AL., Partners, Doing Business as Balfour, Guthrie & Co.; Malvina Short, Administratrix of the Estate of Marshal B. Short, Deceased; Sven Anderson, Administrator of the Estate of John August Peterson, Deceased, and Anna C. Larson, Mother of John August Peterson, Deceased, Appellees.

Appeal from the district court of the United States for the district of Oregon.

*Petition for Rehearing and Brief of Appellants.*

To the honorable the United States circuit court of appeals for the ninth circuit:

Now come the appellants and each of them, and, conceiv-
1083 ing themselves aggrieved by the opinion of this honorable court, filed herein on the 3d day of October, 1898, respectfully

move and petition the court for a rehearing in this cause, for the following grounds:

First. That the Oregon Railroad & Navigation Company claims the ownership of the Ocklahama, not as the successor in interest of the Oregon Railway & Navigation Company alone, but as the successor in interest of the Farmers' Loan & Trust Company, trustee of the mortgage of the Ocklahama made by the Oregon Railway & Navigation Company on June 1, 1885.

Second. That the interest of the Oregon Railroad & Navigation Company as the successor of the Farmers' Loan & Trust Company relates back to the date of the mortgage, and is superior to any personal judgment which could be rendered in this proceeding against the Oregon Railway & Navigation Company.

Third. That the interest of the Oregon Railroad & Navigation Company in the Ocklahama, although inferior to any maritime lien existing against the Ocklahama, can only be divested by an adjudication in favor of such maritime lien made in a proceeding *in rem* after seizure, and a hearing had as the result of such seizure, and that no such adjudication has ever been had recognizing any maritime lien in favor of the appellees against the Ocklahama.

Fourth. As the result of filing the petition to limit the personal liability of the Oregon Railway & Navigation Company, proceedings against the Ocklahama were not stayed, but any person claiming to have a maritime lien against such vessel as the result of the injuries done could at any time have had the Ocklahama seized in a suit *in rem*.

1084 Fifth. That the proceeding to limit liability instituted by the Oregon Railway & Navigation Company and the Oregon Short Line & Utah Northern Railway Company was a proceeding *in personam*, arising out of a collision, and could not be converted into a proceeding *in rem* except in violation of the admiralty rules and practice of the Supreme Court of the United States.

The appellants respectfully call the attention of the court to the grounds above stated.

## I.

### The Oregon Railroad & Navigation Company is the successor in interest of the Farmers' Loan & Trust Company.

In each of the answers of the Oregon Railroad & Navigation Company to which exceptions were sustained, it is alleged that the Oregon Railroad & Navigation Company purchased the Ocklahama at a sale had as the result of the foreclosure of a mortgage of the Ocklahama made by the Oregon Railway & Navigation Company to the Farmers' Loan & Trust Company on June 1, 1885 (Transcript of Record, pp. 138, 151, 164 and 177). These allegations of ownership are admitted by the exceptions. As the result of the purchase at such foreclosure sale, the Oregon Railroad & Navigation Company succeeded not simply to the interest of the Oregon Railway & Navigation Company at the time of the sale, but also to the in-

terest of the Farmers' Loan & Trust Company acquired as the result of the making of the mortgage.

Jones on Mortgages, third edition, sec. 1653.
Pomeroy's Equity Jurisprudence, sec. 1228.

The law is thus stated in the section cited in Jones on Mortgages:

1085 "Title acquired by foreclosure relates back to the date of the mortgage, so as to cut off intervening equities and rights. If all subsequent purchasers and incumbrances are made parties to the bill, the title under the mortgage foreclosed is perfected to an absolute one. In such case the purchaser acquires the title of the mortgagee, and also the title of the mortgagor, as it stood at the time of the making of the mortgage."

It is not claimed by the Oregon Railroad & Navigation Company, as stated in the opinion of this court, that such company was an innocent purchaser without notice of the possibilities of any maritime lien being asserted against the Ocklahama, but it is claimed that the Oregon Railroad & Navigation Company stepped into the shoes of the Farmers' Loan & Trust Company, and is entitled to the same rights that the Farmers' Loan & Trust Company had, and that the title of the Oregon Railroad & Navigation Company could be divested only by the same procedure as would have been necessary to have cut off the lien of the Farmers' Loan & Trust Company upon the Ocklahama acquired as the result of the making of the mortgage of June 1, 1885, namely, by a suit *in rem* against the Ocklahama.

II.

The interest of the Oregon Railroad & Navigation Company as the successor of the Farmers' Loan & Trust Company is superior to any judgment *in personam* which could be rendered in this proceeding against the Oregon Railway & Navigation Company.

The mortgage of the Ocklahama to the Farmers' Loan & Trust Company, made on June 1, 1885, is on familiar principles,

1086 repeatedly stated by this court, superior to any personal judgment against the Oregon Railway & Navigation Company as the result of any contract or tort committed by that company after June 1, 1885.

The Farmers' Loan & Trust Company *v.* Northern Pacific Railroad Co., 79 Fed. Rep., 227.
The Northern Pacific Railroad Co. *v.* Heflin, 83 Fed. Rep., 93.
Farmers' Loan & Trust Co. *v.* Longworth, 83 Fed. Rep., 336.
Farmers' Loan & Trust Co. *v.* Nestelle, 79 Fed. Rep., 748.

The superiority of the lien of the mortgage of the Farmers' Loan & Trust Company to personal judgments against the Oregon Railway & Navigation Company would be valueless, unless, as the result of the sale under foreclosure, the purchaser took a title superior to the lien of such judgments against the Oregon Railway & Navigation Company. And such is the rule of law stated by the authori-

ties cited in the preceding point. The Oregon Railroad & Navigation Company therefore acquired the Ocklahama as the result of the foreclosure sale, free and clear from the lien of any personal judgments or adjudications which had been rendered against the Oregon Railway & Navigation Company from June 1, 1885, to the date of the foreclosure sale.

If the proceedings had in this cause by the district court and by this court on the former appeal were personal proceedings against the Oregon Railway & Navigation Company, it would follow on the principles stated that any decree rendered therein against the Oregon Railway & Navigation Company would be inferior in
1087 point of lien to the lien of the mortgage made to the Farmers' Loan & Trust Company, and to the title acquired by the Oregon Railroad & Navigation Company as the result of the foreclosure of such mortgage.

The fact that such personal decree against the Oregon Railway & Navigation Company was rendered in a cause of action which gave rise to a maritime lien against the Ocklahama would not render such personal decree superior to the lien of the mortgage. Neither the Farmers' Loan & Trust Company nor the Oregon Railroad & Navigation Company were parties to the proceedings in this cause had prior to the seizure of the Ocklahama. In order to obtain a limitation of liability, it may have been the duty of the Oregon Railway & Navigation Company to surrender the Ocklahama to a trustee or to give a bond for her appraised value. If a bond for such appraised value had been given, it would have been the personal bond of the Oregon Railway & Navigation Company, and would not have discharged or affected the lien of the mortgage made to the Farmers' Loan & Trust Company. If the Oregon Railway & Navigation Company had sought to surrender the Ocklahama to a trustee for the purpose of limiting its personal liability, the Oregon Railway & Navigation Company would have been required before obtaining such limitation to have obtained a release of the mortgage of the Farmers' Loan & Trust Company upon the Ocklahama, and, failing to obtain such release, would not have been entitled to the limitation of liability.

Benedict's Admiralty (3d edition), sec. 574.

Neither the giving of the bond nor the surrender to the trustee,
*both voluntary acts of the Oregon Railway & Navigation Com-*
1088 *pany itself for the purpose of limiting its own personal liability,*
could defeat the lien of the mortgage of the Farmers' Loan & Trust Company. Any such result would enable the owner of a vessel to discharge a mortgage without payment, as the result of instituting a suit purely for the personal benefit of such owner.

III.

The lien of the mortgage of the Farmers' Loan & Trust Company could only be divested by a decree *in rem* made after hearing and seizure, and no such decree has been made in this proceeding.

It is stated in the opinion of the court that the Oregon Railroad & Navigation Company insists that it acquired the Ocklahama as the result of the purchase made at the foreclosure sale free from maritime liens then existing, including the maritime lien, if any, arising in favor of the appellees against the Ocklahama. The Oregon Railroad & Navigation Company never intended to take any such position. On very familiar principles, the mortgage of the Ocklahama made to the Farmers' Loan & Trust Company was inferior to all maritime liens arising as the result of the operation of the Ocklahama, both prior and subsequent to the date of the making of the mortgage. The Oregon Railroad & Navigation Company purchasing the Ocklahama at a sale under such mortgage necessarily took the Ocklahama subject to all maritime liens against the vessel then existing, and which should be asserted within a reasonable and proper time after the foreclosure sale, and the Oregon Railroad & Navigation Company never intended to assert any proposition to the contrary. The position taken by the Oregon Railroad &
Navigation Company is that no matter how many causes of
1089 action might exist against the Oregon Railway & Navigation Company giving rise to maritime liens against the Ocklahama, the title of the Farmers' Loan & Trust Company in the Ocklahama and of the Oregon Railroad & Navigation Company as its successor, could not be divested as the result of the prosecution of any such cause of action against the Oregon Railway & Navigation Company, but could only be divested by a decree rendered in a proceeding *in rem* against the Ocklahama after seizure and a hearing had as the result of such seizure; and that no decree rendered in a personal action against the Oregon Railway & Navigation Company, though finding facts out of which a maritime lien might arise, could in any way divest the interest of the Farmers' Loan & Trust Company in the Ocklahama. In this country a maritime lien can be executed and divested only by a proceeding *in rem* against the thing itself instituted in an admiralty court of the United States. Upon this subject, Mr. Justice Grier, in Vandewater *v.* Mills, 19 Howard, 89, says:

"The maritime 'privilege' or lien is adopted from the civil law, and imports a tacit hypothecation of the subject of it. It is a '*jus in re*,' without actual possession or any right of possession. It accompanies the property into the hands of a *bona fide* purchaser. It can be executed and divested only by a proceeding *in rem*. This sort of proceeding against personal property is unknown to the common law, and is peculiar to the process of courts of admiralty."

Courts of law, courts of equity and courts of admiralty in actions *in personam* cannot create maritime liens as the result of finding
facts in such personal actions which, if found in an action
1090 *in rem* in admiralty, would give rise to a lien. The facts found in such personal actions do not bind the thing itself,

and cannot affect the rights in the thing of any person other than those who are parties to such personal proceedings. In the present case, neither the Farmers' Loan & Trust Company nor its successor, the Oregon Railroad & Navigation Company, was a party to the proceeding at any time prior to the seizure of the Ocklahama, and could not be bound by any fact found in such personal proceedings. As a result of the institution of the proceeding to limit liability, the Ocklahama was not brought into court in any sense whatsoever, either by the surrender of the vessel to a trustee or by the giving of a bond. Even had the Ocklahama been surrendered to a trustee, the Farmers' Loan & Trust Company would not have been compelled to take notice of the proceedings, for the reason that the notice given in such proceedings is to the persons claiming losses, and the surrender to a trustee would not have divested the lien of the mortgage to the Farmers' Loan & Trust Company. Upon this subject Mr. Benedict in his work on Admiralty, third edition, sec. 573, says:

"But when the owner transfers to a trustee, the case is different. Such a conveyance could hardly be held to have the effect of a sale under the decree of an admiralty court, as to freeing her from prior liens. And it is to be noticed that the provision in the Supreme Court rules for giving notice is for citing 'all persons claiming damages for any such embezzlement, loss, destruction, damage or injury,' which would not include prior mortgagees or prior lienholders, whose existence even might be unknown. But, as I
1091 have already said, if any such prior lien were known and its enforcement or existence might interfere with the obtaining for the creditors in the limitation of liability proceeding, of the whole value of the *res*, it would be in the power of the court to remedy this difficulty."

As to the manner of remedying the difficulty suggested, the attention of the court is called to the preceding section, wherein it is stated that in case the lien of the mortgage was not satisfied, the court could refuse the limitation of liability. The text of Mr. Benedict is supported by reason and common sense. The lien of a mortgage upon a vessel could not be divested or impaired to any extent whatsoever by any transfer made to a trustee by the mortgagor for the purpose of limiting the personal liability of the mortgagor. Such a transfer could not affect the mortgage to any greater extent than would a mere deed of gift made by the mortgagor based upon the consideration of love and affection. The mortgagee is not bound to take any notice of such transfers, and is not bound to take notice of any personal litigation arising between the mortgagor and any person whomsoever, and is not bound to any extent whatsoever as the result of any such suit. The only things which the mortgagor is bound to notice are seizures made by the marshals of the district courts of the United States in proceedings *in rem* to enforce maritime liens; and when such seizure is made, and not until then, is the mortgagee bound to pay any attention to the supposed existence of any maritime lien.

Assume that after the loss of the wheat of Balfour, Guthrie

& Co., by reason of the destruction of the barge Columbia,
duly authorized officers of the Oregon Short Line &
1092 Utah Northern Railway Company and the Oregon Railway & Navigation Company and representatives of Balfour, Guthrie & Co. had met and had entered into the most solemn stipulation possible, to the effect that the Ocklahama was subject to a maritime lien in favor of Balfour, Guthrie & Co., and that then the officers of the Oregon Railway & Navigation Company had executed a deed to Balfour, Guthrie & Co. of the Ocklahama, would not such conveyance be inferior to the lien of the mortgage made to the Farmers' Loan & Trust Co.? Suppose such officers and representatives of the parties had failed to agree upon the existence of the lien, and had submitted the matter to arbitration, and it had been found as a result of the arbitration that the Ocklahama was subject to a maritime lien, and that then the Oregon Railway & Navigation Company had made a conveyance to Balfour, Guthrie & Co. of the Ocklahama, would not such conveyance be subject to the lien of the Farmers' Loan & Trust Company? Assume that, instead of submitting the matter to an ordinary arbitration, the question was presented to a court of competent jurisdiction, either in law, in equity or in admiralty, in a personal proceeding between Balfour, Guthrie & Co. and the Oregon Railway & Navigation Company, could such court render any decree finding in favor of the existence of a maritime lien which would render a conveyance of the Ocklahama by the Oregon Railway & Navigation Company to Balfour, Guthrie & Co. superior to the lien of the mortgage to the Farmers' Loan & Trust Company? Assume that in the present case the Oregon Railway & Navigation Company, instead
of contesting the liability of the Ocklahama in the petition
instituting this proceeding, had conceded such liability and
1093 had expressly alleged that the Ocklahama was subject to a
maritime lien in favor of Balfour, Guthrie & Co., and that upon such allegations the district court had found in favor of the existence of the lien and had held that the Oregon Railway & Navigation Company could not limit its liability without surrendering the Ocklahama, would such action on the part of the Oregon Railway & Navigation Company in such a personal proceeding, voluntarily instituted by itself and for its own benefit in order to limit its personal liability, divest and discharge the lien of the mortgage of the Farmers' Loan & Trust Company, or would not it have been necessary for Balfour, Guthrie & Co., in order to divest the lien of the mortgage, to have instituted a suit *in rem* and to have thus given the Farmers' Loan & Trust Company the opportunity to contend that, as a matter of fact, no maritime lien existed against the Ocklahama in favor of Balfour, Guthrie & Co.? In other words, could the Oregon Railway & Navigation Company, by any action on its part, although aided by the decree of a court having jurisdiction only of parties and not jurisdiction *in rem* over the Ocklahama, have divested the lien of the mortgage of the Farmers' Loan & Trust Company in favor of any maritime lien of Balfour, Guthrie & Co. against the Ocklahama? It would seem that there could be

but one answer to these questions, namely, that no matter how well satisfied the Oregon Railway & Navigation Company might be as to the existence of a maritime lien against the Ocklahama in favor of Balfour, Guthrie & Co., and no matter how many times a court having jurisdiction only of the parties should find in favor
1094 of such maritime lien, the lien of the mortgage made to the Farmers' Loan & Trust Company could only be divested as the result of a proceeding *in rem* in the district court of the United States after seizure of the Ocklahama and opportunity on the part of the Farmers' Loan & Trust Company to be heard against the lien.

A maritime lien, as stated by Mr. Justice Story in The Nestor, 2 Sumner, 83, is "a right of priority of satisfaction out of the proceeds of the thing in a concurrence of creditors." "The concurrence of creditors" can only take place as the result of seizure in a proceeding to enforce the lien, and the consequent notice to all the world of the proceeding. It therefore follows that there can be no jurisdiction *in rem* without seizure.

The Alliance, 70 Fed. Rep., 273.
The Brig Anne, 9 Cranch, 290.

There can be no concurrence of creditors without a hearing in which each creditor is allowed to assert his own lien on the fund, and attempt to defeat the lien of others. As a result, no valid judgment *in rem* can be rendered without a hearing.

Windsor *v.* McVeigh, 93 U. S, 274.
Hovey *v.* Elliott, 167 U. S., 414.

In the present case all of the proceedings were purely personal proceedings between the Oregon Railway & Navigation Company and the Oregon Short Line & Utah Northern Railway Company, on the one side, and the appellees on the other, and could result in nothing other than adjudications which would simply bind the parties thereto. To these proceedings the Farmers' Loan & Trust Company was not a party and was not bound thereby. No privity within the meaning of the law relating to estoppel existed
1095 between the Farmers' Loan & Trust Company and the Oregon Railway & Navigation Company. In order to create the relationship of privity two requisites must exist. In the first place, the person who is to be thus connected with the judgment must be one who claims an interest in the subject affected through or under one of the parties. In the second place, privies are those who acquire an interest in the subject-matter after the rendition of the judgment. If their title or interest attached before that fact they are not bound unless made parties.

Black on Judgments, sec. 549.

The Farmers' Loan & Trust Company acquired its interest in the Ocklahama long prior to the institution of this proceeding, and the Oregon Railroad & Navigation Company stood in its shoes and had the same rights.

If the proceedings be regarded from the first as proceedings in *rem* against the Ocklahama, and those interested therein, then such proceedings from the first were without jurisdiction, for the reason that there had been no seizure and all the proceedings had prior to the seizure were nullities. After the seizure, the Farmers' Loan & Trust Company, or its successor, the Oregon Railroad & Navigation Company, then for the first time notified of any attempt to assert any maritime lien against the Ocklahama, was not allowed to defend, and the decree entered was an adjudication without a hearing and is therefore void.

Windsor *v.* McVeigh, 93 U. S., 282.
Hovey *v.* Elliott, 167 U. S., 414.

1096 IV.

The filing of the petition to limit liability did not stay proceedings *in rem* against the Ocklahama.

The following statement is made in the opinion of this court, to wit:

"As the result of filing the petition, all proceedings against the vessels and their owners were stayed."

It is thereupon stated in the opinion that as the result of the personal insolvency of the petitioners, it is equitable that the Farmers' Loan & Trust Company and its successor, the Oregon Railroad & Navigation Company, should be divested of all right and interest in and to the Ocklahama. Where a tort is committed in the operation of a vessel, there immediately arises a personal liability against the owners, and a maritime lien against the vessel itself. Such personal liability can be enforced in any personal action against the owners. The maritime lien against the vessel can be enforced only in a proceeding *in rem*. The personal liability of the owners may exceed the value of the vessel itself. It therefore follows that after the person injured has exhausted his remedy against the vessel to the extent of its value, such injured person still has a personal action against the owner for the remainder of the damages suffered. The primary and only object of a proceeding like the present is to cut off any right to recover any amount in excess of the value of the vessel itself. This limitation can be obtained by either conveying the vessel to a trustee for the benefit of the injured person, or by giving a bond representing the value of such vessel. Inasmuch as the vessel or her value has been placed in the hands of the court, thus giving to the injured
1097 person every benefit which might be derived from an action *in rem* against the vessel itself, it follows that not only are personal actions against the owner stayed, but also the proceeding *in rem* against the vessel. The stay against the vessel takes effect not by reason of the form of the order staying the personal liability, but from the fact that the injured person has the full benefit of the value of the vessel as the result of her value being placed in the hands of the court.

In the present proceeding, the Oregon Railway & Navigation

Company did not surrender the Ocklahama or give any bond for her value. The petition filed instituting the proceeding (Transcript of Record on former appeal, p. 15) did not pray that any order be granted restraining any suits against the Ocklahama, but prayed only that an order might be made restraining the prosecution of suits against the petitioners. The order of injunction (Transcript of Record, p. 28) did not restrain any person whomsoever from prosecuting any maritime lien of any kind whatsoever against the Ocklahama, but only restained the prosecution of suits and actions against the Oregon Railway & Navigation Company and the Oregon Short Line & Utah Northern Railway Company. In the absence of the surrender of the Ocklahama, no order could or would have been made restraining suits against the Ocklahama itself. There therefore never has been a day from the happening of the accident to the present time when any person having any maritime lien against the Ocklahama could not have undertaken to have asserted such lien by an appropriate proceeding *in rem*.

Even if an order had been made restraining suits against
1098 the Ocklahama, it would have been the duty of the appellees to have called the attention of the court to the fact that the Ocklahama had not been surrendered, and it would have followed as a matter of course that the injunction would have been modified. The real fact is that until the Oregon Short Line & Utah Northern Railway Company became insolvent, the appellees wished to realize the full amount of their claims considerably in excess of the value of the Ocklahama, and were willing to rely upon the solvency of the Oregon Short Line & Utah Northern Railway Company, and it was only after the Oregon Short Line & Utah Northern Railway Company became insolvent that the appellees have undertaken to twist this proceeding into one *in rem* against the Ocklahama.

The fact that the Oregon Short Line & Utah Northern Railway Company and the Oregon Railway & Navigation Company have become insolvent during the litigation does not create any equity in favor of the appellees. Such insolvency might naturally have occurred in the course of any ordinary personal litigation. Such insolvency did occur in the case of the Northern Pacific Railway Company during the prosecution of the suits terminating in the judgments in favor of the claimants in the following cases:

The Farmers' Loan & Trust Co. *v.* Northern Pacific R. R. Co., 79 Fed. Rep., 227.

The Northern Pac. R. R. Co. *v.* Hefflyn, 83 Fed. Rep., 93.

The Farmers' Loan & Trust Co. *v.* Longworthy, 83 Fed. Rep., 336.

1099 The Farmers' Loan & Trust Co. *v.* Nestelle, 79 Fed. Rep., 748.

The causes of action out of which the judgments against the Northern Pacific referred to arose are certainly as meritorious, from an equitable standpoint, as that of Balfour, Guthrie & Co., and yet in the cases just cited the mortgage upon the railroad property was held superior to the equities of the judgment creditors. The only

difference between the cases referred to and the present one is that as the result of the happening of the accident a maritime lien may have arisen in favor of Balfour, Guthrie & Co. against the Ocklahama; but such maritime lien has never been undertaken to be asserted in any appropriate proceeding. Certainly no reason of an equitable nature exists whereby the Farmers' Loan & Trust Company and its successor in interest, the Oregon Railroad & Navigation Company, should be deprived of the value of the Ocklahama for the benefit of the appellees.

V.

The proceeding to limit liability instituted by the Oregon Railway & Navigation Company was a proceeding *in personam* arising out of a collision, and could not be converted into a proceeding *in rem.*

The court in its opinion refers to this point in stating the contentions made by the Oregon Railroad & Navigation Company, but the question is not afterwards discussed in the opinion. One of two things is necessarily true: The proceedings had prior to the seizure must be regarded either as proceedings *in rem* or as proceedings *in personam.* If they were proceedings *in rem* then not even the Oregon Railway & Navigation Company was bound thereby for
1100 the reason that there had been no seizure, and consent of the parties appearing in the proceeding could not confer jurisdiction upon the court.

Henry's Admiralty Jurisdiction and Procedure, sec. 132.

As effect is given to the adjudication prior to seizure, it must therefore be conceded that the proceedings had prior to seizure are regarded by the court as proceedings *in personam.* After the seizure, what was the nature of the proceeding which terminated in the decree from which this appeal was taken? It must necessarily be regarded as a proceeding *in rem*, for the reason that the decree rendered seeks to enforce the maritime lien against the Ocklahama, and divests the lien of the mortgage made to the Farmers' Loan & Trust Company. This is necessarily so for the reason that any personal decree rendered against the Oregon Railway & Navigation Company would under the decisions of this court be inferior to the lien of the mortgage to the Farmers' Loan & Trust Company. It must necessarily be conceded, in order to sustain the decree which has been rendered, that the proceeding in the commencement was one *in personam* between the Oregon Railway & Navigation Company on the one hand, and the appellees on the other, and was converted into an action *in rem* against the Ocklahama and her creditor, the Farmers' Loan & Trust Company. This is a suit arising out of a collision, and in such proceeding there can be no amendment whereby a suit *in personam* can be changed into one *in rem.* (See The Corsair, 145 U. S., 335, and the discussion of this subject found in the brief of the Oregon Railroad & Navigation Company on this appeal, page 48.)

1101 For the reasons stated, and upon the grounds hereinbefore set forth, the appellants, your petitioners, respectfully pray that a rehearing of this cause be granted.

THE OREGON RAILROAD & NAVIGATION CO.,
By W. W. COTTON, *Its Proctor.*
THE OREGON RAILWAY & NAVIGATION CO.,
By W. W. COTTON, *Its Proctor.*
THE OREGON SHORT LINE & UTAH NORTHERN R'Y CO.,
By W. W. COTTON, *Its Proctor.*

STATE OF OREGON,
*County of Multnomah,* } ss:

I, W. W. Cotton, one of the proctors for the appellants in the above-entitled cause, do hereby certify that in my judgment the foregoing petition and facts and reasons therein stated are well founded and that said petition presents a proper cause to grant to the appellant a rehearing herein, and that said petition is not interposed for delay, but that substantial justice may be done.

Dated this 28th day of October, 1898, at Portland, Or.

W. W. COTTON.

1102 At a stated term, to wit, the October term, A. D. 1898, of the United States circuit court of appeals for the ninth circuit, held at the court-room, in the city and county of San Francisco, on Thursday, the second day of March, in the year of our Lord one thousand eight hundred and ninety-nine.

Present: The Honorable William B. Gilbert, circuit judge; Honorable Erskine M. Ross, circuit judge; Honorable William W. Morrow, circuit judge.

OREGON RAILROAD AND NAVIGATION COMPANY ET AL., Appellants,
*v.*
ROBERT BALFOUR ET AL.,
and
ROBERT BALFOUR ET AL., Appellants,
*v.*
OREGON RAILROAD AND NAVIGATION COMPANY ET AL. } No. 435.

Ordered petition for a rehearing heretofore filed herein be, and the same is hereby, denied.

1103 In the United States Circuit Court of Appeals for the Ninth Circuit.

THE OREGON RAILROAD & NAVIGATION COMPANY, THE OREGON Railway & Navigation Company, and The Oregon Short Line and Utah Northern Railway Company, Appellants,

*v.*

ROBERT BALFOUR ET AL., Partners, Doing Business as Balfour, Guthrie & Co.; Malvina Short, Administratrix of Marshall B. Short, Deceased; Sven Anderson, Administrator of John August Peterson, Deceased, and Anna C. Larsen, Respondents.

*Petition of the Oregon Railroad & Navigation Company for an Appeal from the Decree of the Circuit Court of Appeals.*

The Oregon Railroad & Navigation Company conceives itself aggrieved by the decree entered in the above entitled proceeding by the United States circuit court of appeals for the ninth circuit on the 3rd day of October, 1898, affirming the decree made and entered in the above-entitled proceeding by the district court of the United States for the district of Oregon on August 2nd, 1897, and re-entered on December 20th, 1897, said decree being in favor of Robert Balfour, Stephen Williamson, Alexander Guthrie, Robert Brodie Forman, R. Bruce, and Walter J. Burns, partners, doing business as Balfour, Guthrie & Co., and in favor of Malvina Short, administratrix of Marshall B. Short, deceased, and in favor of Sven Anderson, administrator of the estate of John August Peterson, deceased, and ordering and decreeing that the Oregon Railroad & Navigation Company pay into the registry of the said district court for distribution as provided in said decree the sum of eighty-six hundred ($8,600) dollars, and doth hereby appeal from the said decree of the said United States circuit court of appeals for the
1104 ninth circuit to the Supreme Court of the United States, and prays that this its appeal may be allowed and that the clerk of this court be directed to prepare forthwith a transcript of the record in this cause, and to transmit the same without delay to the Supreme Court of the United States.

A. R. COTTON &
W. W. COTTON,
*Proctors for the Petitioner and Appellant, The Oregon Railroad & Navigation Company.*

Due service of the foregoing petition for appeal, by certified copy as required by law, is hereby admitted, at Portland, Oregon, this — day of March, 1899.

WILLIAMS, WOOD & LINTHICUM,
*Proctors for Robert Balfour et al., Partners, Doing Business as Balfour, Guthrie & Co.*

WATSON & BEEKMAN,
*Proctors for Malvina Short, Sven Anderson, and Anna C. Larsen.*

(Endorsed:) No. 435. In the United States circuit court of appeals for the ninth circuit. The Oregon Railroad & Navigation Company *et al.*, appellants, *v.* Robert Balfour *et al.*, respondents. Petition for appeal. Filed Mar. 6, 1899. F. D. Monckton, clerk U. S. circuit court of appeals for the ninth circuit.

1105 In the United States Circuit Court of Appeals for the Ninth Circuit.

THE OREGON RAILROAD & NAVIGATION COMPANY, THE Oregon Railway & Navigation Company, and The Oregon Short Line and Utah Northern Railway Company, Appellants,

*vs.*

ROBERT BALFOUR ET AL., Partners, Doing Business as Balfour, Guthrie & Co.; Malvina Short, Administratrix of Marshall B. Short, Deceased; Sven Anderson, Administrator of John August Peterson, Deceased, and Anna C. Larsen, Respondents.

No. 435.

The Oregon Railroad & Navigation Company, having appealed to the Supreme Court of the United States from the decrees made and entered in said proceeding by the United States circuit court of appeals for the ninth circuit, now makes in connection with said appeal the following assignment of errors and states that in the records and proceedings in the above-entitled cause, upon the hearing and determination thereof in the circuit court of appeals for the ninth circuit, there is manifest error in the following matters, to wit:

First. The circuit court of appeals erred in affirming the decree made and entered by the district court of the United States for the district of Oregon on August 2nd, 1897, and re-entered on December 20th, 1897.

1106 Second. The circuit court of appeals in its decree made and entered upon the second appeal herein erred in affirming the decree of the district court of the United States for the district of Oregon, made and entered in said district court on August 2nd, 1897, and re-entered in said district court on the 20th day of December, 1897, for the reason that the said district court had no jurisdiction under the mandate of the United States circuit court of appeals entered in said district court on March 16th, 1896, to enter any decree imposing any liability upon this petitioner or the steamer "Ocklahama."

Third. The circuit court of appeals in its decree made and entered upon the second appeal herein erred in affirming the decree of the district court of the United States for the district of Oregon, made and entered in said district court on August 2nd, 1897, and re-entered in said district court on the 20th day of December, 1897, for the reason that the said district court erred in seizing the steamer "Ocklahama" and in making the decree appealed from, because the said district court was without power or authority in

this cause to issue process against the "Ocklahama" or to cause the "Ocklahama" to be seized.

Fourth. The circuit court of appeals in its decree made and entered upon the second appeal herein erred in affirming the decree of the district court of the United States for the district of Oregon, made and entered in said district court on August 2nd, 1897, and re-entered in said district court on the 20th day of December, 1897,
for the reason that the district court erred in seizing the
1107 "Ocklahama" and in making said decree, because no libel
*in rem* had or ever has been filed in this proceeding against the "Ocklahama."

Fifth. The circuit court of appeals in its decree made and entered upon the second appeal herein erred in affirming the decree of the district court of the United States for the district of Oregon, made and entered in said district court on August 2nd, 1897, and re-entered in said district court on the 20th day of December, 1897, because the district court erred in seizing the "Ocklahama" and in entering the decree so affirmed, for the reason that this proceeding was commenced by the Oregon Railway & Navigation Company and the Oregon Short Line & Utah Northern Railway Company to limit their personal liability and was a suit *in personam*, and the seizure of the said "Ocklahama" changed the said proceeding *in personam* arising out of a collision into a proceeding *in rem*, and said seizure in this proceeding and said decree so affirmed was contrary to the admiralty rules and practice of the Supreme Court of the United States.

Sixth. The circuit court of appeals in its decree made and entered upon the second appeal herein erred in affirming the decree of the district court of the United States for the district of Oregon, made and entered in said district court on August 2nd, 1897, and re-entered in said district court on the 20th day of December, 1897, because the district court erred in decreeing that the steamer "Ocklahama" or her value should be surrendered, for the reason that there is no evidence showing that the towage services of the steamtug "Ocklahama" were not fully performed when the said
barge "Columbia" was placed alongside of the dock at
1108 Astoria, but, on the contrary, the evidence shows that said
services of the said steamtug "Ocklahama" were at the time of the alleged injuries to the respondents and each of them fully performed.

Seventh. The circuit court of appeals in its decree made and entered upon the second appeal herein erred in affirming the decree of the district court of the United States for the district of Oregon, made and entered in said district court on the 2nd of August, 1897, and re-entered in said district court on the 20th day of December, 1897, because the district court erred in decreeing that the steamer "Ocklahama" and the barge "Columbia" constituted one vessel within the meaning of the act of Congress entitled "An act to limit the liability of ship-owners and for other purposes," approved March 3, 1851, and the various statutes in addition thereto and amendatory thereof.

Eighth. The circuit court of appeals in its decree made and entered upon the second appeal herein erred in affirming the decree of the district court of the United States for the district of Oregon, made and entered in said district court on August 2nd, 1897, and re-entered in said district court on the 20th day of December, 1897, because the district court erred in seizing the "Ocklahama" and in decreeing that the said "Ocklahama" or her value should be surrendered, for the reason that if the Oregon Railway & Navigation Company or the Oregon Short Line and Utah Northern Railway Company or both of them were not entitled by reason of the filing of the petition initiating this proceeding and by reason of the payment into court of the appraised value of the —— and of the matters and things done by the said petitioners to limit their liabil-
1109 ity, then, and in that event, it was the duty of the district court, under the rules and practice in such cases made and provided, to have dismissed this proceeding and have allowed the said Robert Balfour and others and the said administratrix of the estate of Marshall B. Short and the administrator of the estate of John August Peterson and Anna C. Larsen to have taken such remedy as they or either of them might have been advised against the Oregon Railway & Navigation Company, or the Oregon Short Line and Utah Northern Railway Company, or both, or to have confined the relief granted to said respondents or either of them to personal decrees and judgments against the Oregon Railway & Navigation Company, or the Oregon Short Line and Utah Northern Railway Company, or both, as the court might have been advised under the evidence and findings of fact, and the circuit court of appeals by its decree should have so ordered.

Ninth. The circuit court of appeals in its decree made and entered upon the second appeal herein erred in affirming the decree of the district court of the United States for the district of Oregon, made and entered in said district court on August 2nd, 1897, and re-entered in said district court on the 20th day of December, 1897, for the reason that the district court erred in sustaining the exceptions of Robert Balfour and others to the answer of the Oregon Railroad & Navigation Company to the answer of the said Robert Balfour and others, said answer of the Oregon Railroad & Navigation Company being filed July 28, 1897, and erred in refusing to allow the Oregon Railroad & Navigation Company to introduce evi-
1110 dence in support of its said answer, and in depriving the said The Oregon Railroad & Navigation Company, as the claimant of the steamer "Ocklahama," of a trial upon the issues made by said answer.

Tenth. The circuit court of appeals in its decree made and entered upon the second appeal herein erred in affirming the decree of the district court of the United States for the district of Oregon, made and entered in said district court on August 2nd, 1897, and re-entered in said district court on the 20th day of December, 1897, for the reason that the district court erred in sustaining the exceptions of Anna C. Larsen, mother of John August Peterson, to the answer of the Oregon Railroad & Navigation Company to the

answer of the said Anna C. Larsen, mother of John August Peterson, said answer of the Oregon Railroad & Navigation Company being filed July 28, 1897, and erred in refusing to allow the Oregon Railroad & Navigation Company to introduce evidence in support of its said answer, and in depriving the said The Oregon Railroad & Navigation Company, as the claimant of the steamer "Ocklahama," of a trial upon the issues made by said answer.

Eleventh. The circuit court of appeals in its decree made and entered upon the second appeal herein erred in affirming the decree of the district court of the United States for the district of Oregon, made and entered in said district court on August 2nd, 1897, and re-entered in said district court on the 20th day of December, 1897, for the reason that the district court erred in sustaining the exceptions of Sven Anderson, administrator of the estate of John August Peterson, deceased, to the answer of the Oregon Railroad &
1111 Navigation Company to the answer of the said Sven Anderson, administrator of the estate of John August Peterson, deceased, said answer of the Oregon Railroad & Navigation Company being filed July 28, 1897, and erred in refusing to allow the Oregon Railroad & Navigation Company to introduce evidence in support of its said answer, and in depriving the said The Oregon Railroad & Navigation Company, as the claimant of the steamer "Ocklahama," of a trial upon the issues made by said answer.

Twelfth. The circuit court of appeals in its decree made and entered upon the second appeal herein erred in affirming the decree of the district court of the United States for the district of Oregon, made and entered in said district court on August 2nd, 1897, and re-entered in said district court on the 20th day of December, 1897, for the reason that the district court erred in sustaining the exceptions of Malvina Short, administratrix of the estate of Marshall B. Short, deceased, to the answer of the Oregon Railroad & Navigation Company to the answer of the said Malvina Short, administratrix of the estate of Marshall B. Short, deceased, said answer of the Oregon Railroad & Navigation Company being filed July 28, 1897, and erred in refusing to allow the Oregon Railroad & Navigation Company to introduce evidence in support of its said answer, and in depriving the said The Oregon Railroad & Navigation Company, as the claimant of the steamer "Ocklahama," of a trial upon the issues made by said answer.

Thirteenth. The circuit court of appeals in its decree made and entered upon the second appeal herein erred in affirming the
1112 decree of the district court of the United States for the district of Oregon, made and entered in said district court on August 2nd, 1897, and re-entered in said court on the 20th day of December, 1897, for the reason that the district court erred in refusing to allow the Oregon Railroad & Navigation Company to introduce evidence in support of its several answers to the answer of Robert Balfour and others, and in depriving the Oregon Railroad & Navigation Company and the steamer "Ocklahama" of a trial upon the issues made by said answer and of its day in court.

Fourteenth. The circuit court of appeals in its decree made and en-

tered upon the second appeal herein erred in affirming the decree of the district court of the United States for the district of Oregon, made and entered in said district court on August 2nd, 1897, and re-entered in said district court on the 20th day of December, 1897, for the reason that the district court erred in refusing to allow the Oregon Railroad & Navigation Company to introduce evidence in support of its several answers to the answer of Sven Anderson, administrator of the estate of John August Peterson, deceased, and in depriving the Oregon Railroad & Navigation Company and the steamer "Ocklahama" of a trial upon the issues made by said answer and of its day in court.

Fifteenth. The circuit court of appeals in its decree made and entered upon the second appeal herein erred in affirming the decree of the district court of the United States for the district of Oregon, made and entered in said district court on August 2nd, 1897, and re-entered in said district court on the 20th day of December,
1113 1897, for the reason that the district court erred in refusing to allow the Oregon Railroad & Navigation Company to introduce evidence in support of its several answers to the answer of Malvina Short, administratrix of the estate of Marshall B. Short, deceased, and in depriving the Oregon Railroad & Navigation Company and the steamer "Ocklahama" of a trial on the issues made by said answer and of its day in court.

Sixteenth. The circuit court of appeals in its decree made and entered upon the second appeal herein erred in affirming the decree of the district court of the United States for the district of Oregon, made and entered in said district court on August 2nd, 1897, and re-entered in said district court on the 20th day of December, 1897, for the reason that the district court erred in decreeing that Robert Balfour and others had any interest in or lien upon the steamer "Ocklahama" as the result of any decree or proceedings had in this suit superior to the right, title, interest, and estate of this appellant arising by reason of the purchase of the said steamer by this appellant as the result of the foreclosure of the mortgage made by the Oregon Railway & Navigation Company to the Farmers' Loan & Trust Company, and referred to in the answer of this appellant to the answer of Robert Balfour and others, such answer of appellant being filed July 28, 1897.

Seventeenth. The circuit court of appeals in its decree made and entered upon the second appeal herein erred in affirming the decree of the district court of the United States for the district of Oregon, made and entered in said district court on August 2nd, 1897,
1114 and re-entered in said district court on the 20th day of December, 1897, for the reason that the district court erred in decreeing that Sven Anderson, administrator of the estate of John August Peterson, deceased, had any interest in or lien upon the steamer "Ocklahama" as the result of any decree or proceedings had in this suit superior to the right, title, interest, and estate of this appellant arising by reason of the purchase of the said steamer by this appellant as the result of the foreclosure of the mortgage made by the Oregon Railway & Navigation Company to the Farmers'

Loan & Trust Company, and referred to in the answer of this appellant to the answer of Sven Anderson, administrator of the estate of John August Peterson, deceased, such answer of appellant being filed July 28, 1897.

Eighteenth. The circuit court of appeals in its decree made and entered upon the second appeal herein erred in affirming the decree of the district court of the United States for the district of Oregon, made and entered in said district court on August 2nd, 1897, and re-entered in said district court on the 20th day of December, 1897, for the reason that the district court erred in decreeing that Malvina Short, administratrix of the estate of Marshall B. Short, deceased, had any interest in or lien upon the steamer "Ocklahama" as the result of any decree or proceedings had in this suit superior to the right, title, interest, and estate of this appellant arising by reason of the purchase of the said steamer by this appellant as the result of the foreclosure of the mortgage made by the Oregon Railway & Navigation Company to the Farmers' Loan & Trust Company,
1115 and referred to in the answer of this appellant to the answer of Malvina Short, administratrix of the estate of Marshall B. Short, deceased, such answer of the appellant being filed July 28, 1897.

Nineteenth. The circuit court of appeals in its decree made and entered upon the second appeal herein erred in affirming the decree of the district court of the United States for the district of Oregon, made and entered in said district court on August 2nd, 1897, and re-entered in said district court on the 20th day of December, 1897, for the reason that the district court erred in decreeing that this appellant and its bondsman, J. G. Woodworth, or either of them, were liable for any portion of the services of the marshal's keeper of the said "Ocklahama" prior to September 30, 1896, and erred in decreeing that Robert Balfour and others and Malvina Short, administratrix of the estate of Marshall B. Short, as aforesaid, and Sven Anderson, as administrator of the estate of John August Peterson, deceased, as aforesaid, should have and recover any part of said fees against this appellant or against its bondsman, J. G. Woodworth, and erred in decreeing that execution should issue therefor.

Twentieth. The circuit court of appeals in its decree made and entered upon the second appeal herein erred in affirming the decree of the district court of the United States for the district of Oregon, made and entered in said district court on August 2nd, 1897, and re-entered in said district court on the 20th day of December, 1897, for the reason that after the seizure of the "Ocklahama" there
1116 was no hearing before any court of any defense undertaken to be made by the said "Ocklahama" or by this appellant.

Twenty-first. The circuit court of appeals in its decree made and entered upon the second appeal herein erred in holding that the proceedings had prior to the seizure of the "Ocklahama" constituted an adjudication against the "Ocklahama" and all persons claiming any interest in the said "Ocklahama."

Twenty-second. The circuit court of appeals in its decree made

and entered upon the second appeal herein erred in finding that as the result of the proceedings had in this suit the respondents, Robert Balfour *et al.*; Malvina Short, administratrix, and Sven Anderson, administrator, had any interest in or lien upon the steamer "Ocklahama" superior to the right, title, interest, and estate of this appellant in the said vessel acquired as the result of the foreclosure of the mortgage made by the Oregon Railway & Navigation Company to the Farmers' Loan & Trust Company and referred to in the several answers of this appellant filed in the district court July 28, 1897.

Wherefore the Oregon Railroad & Navigation Company prays that said decree of the circuit court of appeals affirming the decree of the district court entered on August 2nd, 1897, and re-entered on December 20th, 1897, and the said decree of the district court so affirmed be vacated, set aside, and held for naught.

A. R. COTTON &
W. W. COTTON,
*Proctors for the Appellant The Oregon Railroad & Navigation Company.*

1117 Due service of the foregoing assignment of errors by certified copy, as provided by law, is hereby admitted at Portland, Oregon, this 4th day of March, 1899.

WILLIAMS, WOOD & LINTHICUM,
*Proctors for Robert Balfour et al., Partners, Doing Business as Balfour, Guthrie & Co.*
WATSON & BEEKMAN,
*Proctors for Malvina Short, Sven Anderson, and Anna C. Larsen.*

(Endorsed:) Assignment of errors. Filed Mar. 6, 1899. F. D. Monckton, clerk U. S. circuit court of appeals for the ninth circuit.

1118 In the United States Circuit Court of Appeals for the Ninth Circuit.

THE OREGON RAILROAD & NAVIGATION COMPANY, THE OREGON Railway & Navigation Company, and The Oregon Short Line & Utah Northern Railway Company, Appellants,
*vs.*
ROBERT BALFOUR ET AL., Partners, Doing Business as Balfour, Guthrie & Co.; Malvina Short, Administratrix of Marshall B. Short, Deceased; Sven Anderson, Administrator of John August Peterson, Deceased, and Anna C. Larsen, Respondents.

*Petition of the Oregon Railway & Navigation Company and the Oregon Short Line & Utah Northern Railway Company for an Appeal from the Decree of the Circuit Court of Appeals.*

The Oregon Railway & Navigation Company and the Oregon Short Line & Utah Northern Railway Company and each of them conceive themselves aggrieved by the decree entered in the above-

entitled proceeding by the United States circuit court of appeals for the ninth circuit on the third day of October, 1898, affirming the decree made and entered in the above-entitled proceeding by the district court of the United States for the district of Oregon on August second, 1897, and re-entered on December 20th, 1897, said decree being in favor of Robert Balfour, Stephen Williamson, Alexander Guthrie, Robert Brodie Forman, R. Bruce, and Walter J. Burns, partners, doing business as Balfour, Guthrie & Co., and in favor of Malvina Short, administratrix of Marshall B. Short, deceased, and in favor of Sven Anderson, administrator of the estate of John August Peterson, deceased, and ordering and decreeing that the Oregon Railroad & Navigation Company pay into the registry of the said district court for distribution as provided in said
1119 decree *of* the sum of eighty-six hundred ($8,600) dollars, and conceive themselves aggrieved by the decree entered in the above-entitled proceeding by the United States circuit court of appeals for the ninth circuit on February 10th, 1896, reversing the decree of the district court of the United States for the district of Oregon, entered in said district court on the 19th day of February, 1894, which said decree of said district court was on the 26th day of February, 1894, duly modified by the order of said district court, and do hereby appeal from the said decrees and each of them of the United States circuit court of appeals for the ninth circuit to the Supreme Court of the United States, and prays that this appeal may be allowed, and that the clerk of this court be directed to prepare forthwith a transcript of the record in this cause and to transmit the same without delay to the Supreme Court of the United States.

A. R. COTTON &
W. W. COTTON,
*Proctors for the Petitioners and Appellants The Oregon Railway & Navigation Company and The Oregon Short Line & Utah Northern Railway Company.*

Due service of the foregoing petition for appeal by certified copy, as required by law, is hereby admitted at Portland, Oregon, this 4th day of March, 1899.

WILLIAMS, WOOD & LINTHICUM,
*Proctors for Robert Balfour et al., Partners, Doing Business as Balfour, Guthrie & Co.*
WATSON & BEEKMAN,
*Proctors for Malvina Short, Sven Anderson, and Anna C. Larsen.*

(Endorsed:) No. 435. In the United States circuit court of appeals for the ninth circuit. The Oregon Railroad & Navigation Company *et al. vs.* Robert Balfour *et al.* Petition for appeal. File Mar. 6, 1899. F. D. Monckton, clerk U. S. circuit court of appeals for the ninth circuit.

1120 In the United States Circuit Court of Appeals for the Ninth Circuit.

THE OREGON RAILROAD & NAVIGATION COMPANY, THE Oregon Railway & Navigation Company, and The Oregon Short Line and Utah Northern Railway Company, Appellants,

*vs.*

ROBERT BALFOUR ET AL., Partners, Doing Business as Balfour, Guthrie & Co.; Malvina Short, Administratrix of Marshall B. Short, Deceased; Sven Anderson, Administrator of John August Peterson, Deceased, and Anna C. Larsen, Respondents.

No. 435.

The Oregon Railway & Navigation Company and the Oregon Short Line & Utah Northern Railway Company and each of them, having appealed to the Supreme Court of the United States from the decrees made and entered in the said proceeding by the United States circuit court of appeals for the ninth circuit, now make and each of them makes, in connection with said appeal, the following assignment of errors, and state and each of them states that in the records and proceedings in the above-entitled cause upon the hearings and determination thereof in the said circuit court of appeals for the ninth circuit there is manifest error in the following matters, to wit:

First. The circuit court of appeals erred in reversing the decree of the district court of the United States for the district of Oregon, entered on the 19th day of February, 1894, which decree was
1121 on the 26th day of February, 1894, duly modified by the order of said district court.

Second. The circuit court of appeals in its decree made and entered on the first appeal herein erred in decreeing that these appellants, The Oregon Railway & Navigation Company and The Oregon Short Line & Utah Northern Railway Company, could not limit their liability for the damage done by the barge "Columbia" without surrendering the steamer "Ocklahama."

Third. The circuit court of appeals in its decree made and entered on the first appeal herein erred in decreeing that the barge "Columbia" and the steamer "Ocklahama" constituted but one vessel within the meaning of the act of Congress entitled An act to limit the liability of ship-owners, and for other purposes, approved March 3, 1871, and the various statutes in addition thereto and amendatory thereof, and in decreeing that these appellants could not limit their liability in respect to the matters and things mentioned and described in the petition filed by these appellants under said acts without surrendering the "Ocklahama," and erred in reversing on said ground the decree of the district court of the United States for the district of Oregon, made and entered in said court on the 19th day of February, 1894, and modified on the 26th day of February, 1894.

Fourth. The circuit court of appeals in its decree made and entered upon the first appeal made herein erred in decreeing that the steamer "Ocklahama" or these appellants as the owner- or lessee-thereof respectively were in any way liable to Robert Balfour and others, partners, doing business as Balfour, Guthrie & Co., or to Malvina Short, administratrix of the estate of Marshall B. Short, deceased, or to Sven Anderson, administrator of the estate of John August Peterson, deceased, or to Anna C. Larsen by reason of any act or thing done or committed by the said "Ocklahama" or the persons having her in charge, and erred in reversing on said ground
the decree of the district court of the United States for the
1122 district of Oregon, made and entered on the 19th day of February, 1894, and modified on the 26th day of February, 1894.

Fifth. The circuit court of appeals in its decree made and entered upon the second appeal herein erred in affirming the decree of the district court of the United States for the district of Oregon, made and entered in said district court on August 2nd, 1897, and re-entered in said district court on the 20th day of December, 1897, for the reason that under the mandate of the said United States circuit court of appeals entered in said district court on March 16, 1896, the said district court had no jurisdiction to enter any personal judgment or decree against these appellants or either of them except for the costs of said proceeding.

Sixth. The circuit court of appeals in its decree made and entered upon the second appeal herein erred in affirming the decree of the district court of the United States for the district of Oregon, made and entered in said court on August 2nd, 1897, and re-entered on the 20th day of December, 1897, for the reason that said district court had no jurisdiction to enter any decree under the mandate of the circuit court of appeals imposing any liability upon these appellants or either of them or upon the steamer "Ocklahama."

Seventh. The circuit court of appeals in its decree made and entered upon the second appeal herein erred in affirming the decree of the district court of the United States for the district of Oregon, made and entered in said court on August 2nd, 1897, and re-entered on the 20th day of December, 1897, for the reason that said district court in said decree erred in ordering and decreeing the payment into court of the value of the steamer "Ocklahama" or the delivery
to trustees of said steamer or of any interest in said steamer
1123 as a condition to the right of these appellants or either of them to limit its or their liability in respect to the matters and things alleged in the petition of these appellants initiating this proceeding and filed in said district court on the 29th day of November, 1892.

Eighth. The circuit court of appeals in its decree made and entered upon the second appeal herein erred in affirming the decree of the district court of the United States for the district of Oregon, made and entered in said court on August 2nd, 1897, and re-entered on the 20th day of December, 1897, for the reason that the said decree of the district court so affirmed was not in accordance with the opinion of the said United States circuit court of appeals

in this proceeding rendered on the first appeal and is inconsistent therewith.

Ninth. The circuit court of appeals in its decree made and entered upon the second appeal herein erred in affirming the decree of the district court of the United States for the district of Oregon, made and entered in said court on August 2nd, 1897, and re-entered on the 20th day of December, 1897, for the reason that the said district court erred in seizing the steamer "Ocklahama" and in making the said decree so affirmed for the reason that said district court was without power or authority in this cause to issue process against the "Ocklahama" or to cause the "Ocklahama" to be seized.

Tenth. The circuit court of appeals in its decree made and entered upon the second appeal herein erred in affirming the decree of the district court of the United States for the district of Oregon, made and entered in said court on August 2nd, 1897, and re-entered on the 20th day of December, 1897, because the district court erred in seizing the "Ocklahama" and in entering said decree for the reason that this proceeding was commenced by these appellants to limit their personal liability and was a suit *in per-*
1124 *sonam*, and that the seizure of the said "Ocklahama" and that the decree of the district court so affirmed changed the said proceeding *in personam* arising out of a collision into a proceeding *in rem*, and such action is contrary to the admiralty rules and practice of the Supreme Court of the United States.

Eleventh. The circuit court of appeals in its decree made and entered upon the second appeal herein erred in affirming the decree of the district court of the United States for the district of Oregon, made and entered in said court on August 2nd, 1897, and re-entered on the 20th day of December, 1897, because the district court in said decree erred in decreeing that the steamer "Ocklahama" or her value should be surrendered in order that these appellants and each of them might limit its or their liability to the said Robert Balfour and others, the respondents herein, for the reason that there was no evidence showing that the towage services of the steamtug "Ocklahama" were not fully performed when the said barge "Columbia" was placed alongside the dock at Astoria, but, on the contrary, the evidence shows that the said services of the said "Ocklahama" were at the time of the alleged injuries to said respondents and each of them fully performed.

Twelfth. The circuit court of appeals in its decree made and entered upon the second appeal herein erred in affirming the decree of the district court of the United States for the district of Oregon, made and entered in said court on August 2nd, 1897, and re-entered on the 20th day of December, 1897, because the district court erred in seizing the steamer "Ocklahama" in this proceeding and in decreeing that the steamer "Ocklahama" or her value should be limited in order that these appellants or each of them might limit its or their liability for the damages mentioned in the petition of these appellants initiating this proceeding and filed in the
1125 district court on the 29th day of November, 1892, for the reason that these appellants have never sought to limit their

liability or the liability of either of them for any damages caused or done by the said steamer "Ocklahama."

Thirteenth. The circuit court of appeals in its decree made and entered upon the second appeal herein erred in affirming the decree of the district court of the United States for the district of Oregon, made and entered in said court on August 2nd, 1897, and re-entered on the 20th day of December, 1897, because the district court erred in seizing the "Ocklahama," and erred in decreeing that the said "Ocklahama" or her value should be surrendered in this proceeding, for the reason that if these appellants or either of them were not entitled by reason of the filing of the petition initiating this proceeding and by reason of the payment into court of the appraised value of the barge "Columbia" and the other matters and things done by these appellants to limit their liability and the liability of each of them to the said Robert Balfour and others and to the estates of Marshall B. Short and John August Peterson and Anna C. Larsen, then and in that event it was the duty of the said district court, under the rules and practice in such cases made and provided, to have dismissed this proceeding and to have allowed the said Robert Balfour and others and the administratrix of the said estate of Marshall B. Short and the administrator of the estate of John August Peterson and Anna C. Larsen to have taken such remedy as they or either of them might have been advised against these appellants or either of them, or else to have confined the relief granted to the said Robert Balfour and others and the said administratrix and administrator and the said Anna C. Larsen to personal decrees and judgments against the Oregon Railway & Navigation Company or the Oregon Short Line & Utah Northern Rail-
1126 way Company or both, as the court might have been advised under the evidence and findings of fact.

Fourteenth. The circuit court of appeals in its decree made and entered upon the second appeal herein erred in affirming the decree of the district court of the United States for the district of Oregon, made and entered in said court on August 2nd, 1897, and re-entered on the 20th day of December, 1897, because the district court erred in decreeing that the steamer "Ocklahama" should be seized or the said steamer or her value surrendered in this proceeding, for the reason that such relief so decreed is improper under the rules and practice in proceedings of this character.

Fifteenth. The circuit court of appeals in its decree made and entered upon the second appeal herein erred in affirming the decree of the district court of the United States for the district of Oregon, made and entered in said court on August 2nd, 1897, and re-entered on the 20th day of December, 1897, because the district court in decreeing that Robert Balfour and others, doing business as partners under the name of Balfour, Guthrie & Co.; Malvina Short, administratrix of the estate of Marshall B. Short, deceased, and Sven Anderson, administrator of the estate of John August Peterson, deceased, or either of them should have or recover any sum whatsoever against the appellant The Oregon Railway & Navigation Company, for the reason that it appears from the pleadings,

evidence, and findings of fact made by the district court that the said appellant, The Oregon Railway & Navigation Company, had long prior to the date of the alleged injuries to said persons or any of them duly leased to the Oregon Short Line & Utah Northern Railway Company the said barge "Columbia" and said steamer "Ocklahama," and that the same and each of them were exclusively and solely operated at the time of said injuries by the Oregon
1127 Short Line & Utah Northern Railway Company, and the Oregon Railway & Navigation Company had no interest of any kind whatsoever in said operation and had made no contract for the carriage of the wheat belonging to said Robert Balfour and others, and had not in its employ the said Marshall B. Short and the said John August Peterson, and was not liable to the said persons or either of them for any injuries received by them or either of them.

Wherefore these appellants pray, and each of them prays, that each of the decrees of the circuit court of appeals may be reversed, set aside, and held for naught; that the decree of the district court of Oregon made and entered on the 19th day of February, 1894, and modified on the 26th day of February, 1894, be affirmed.

A. R. COTTON &
W. W. COTTON,
*Proctors for the Appellant The Oregon Railway & Navigation Company.*

Due service of the within assignment of errors by certified copy as provided by law, is hereby admitted, at Portland, Oregon, this 4th day of March, 1899.

WILLIAMS, WOOD & LINTHICUM,
*Proctors for Robert Balfour, Stephen Williamson, et al., Partners, Doing Business as Balfour, Guthrie & Co.*
WATSON & BEEKMAN,
*Proctors for Malvina Short, Sven Anderson, and Anna C. Larsen.*

(Endorsed:) Assignment of errors. Filed Mar. 6, 1899. F. D. Monckton, clerk U. S. circuit court of appeals for the ninth circuit.

1128 In the United States Circuit Court of Appeals for the Ninth Circuit.

THE OREGON RAILROAD & NAVIGATION COMPANY, THE OREGON Railway & Navigation Company, and The Oregon Short Line & Utah Northern Railway Company, Appellants,

*v.*

ROBERT BALFOUR ET AL., Partners, Doing Business as Balfour, Guthrie & Co.; Malvina Short, Administratrix of Marshall B. Short, Deceased; Sven Anderson, Administrator of John August Peterson, Deceased, and Anna C. Larsen, Respondents.

*Order Allowing Appeal of the Oregon Railroad and Navigation Company from the Decree of the 3rd Day of October, 1898.*

It appearing that the Oregon Railroad & Navigation Company has heretofore filed in the United States circuit court of appeals for the ninth circuit its petition praying for an order allowing an appeal by it to the Supreme Court of the United States from the decree heretofore entered by said court in this cause on the 3rd day of October, 1898, affirming the decree of the district court of the United States for the district of Oregon, made and entered in said district court on August 2, 1897, and vacated and re-entered in said court on the 20th day of December, 1897, and praying that the court should fix the amount of a bond intended to act and be as a supersedeas of the said decree, to be given by it, the said Oregon Railroad & Navigation Company, on said appeal; and

It appearing that assignments of error were filed in said United States circuit court of appeals in connection with said petition:

Now, therefore, it is ordered that the prayer of said petition
1129 be granted, and that the said The Oregon Railroad & Navigation Company be, and it is hereby, allowed to take an appeal as prayed for in said petition upon the giving of a bond for damages and costs on such appeal in the sum of three thousand ($3,000) dollars, and that when said bond is so given the said bond shall act as a supersedeas of said decree.

Dated at Portland, Oregon, this 4th day of April, 1899.

WILLIAM B. GILBERT, *Judge.*

(Endorsed:) No. 435. In the United States circuit court of appeals for the ninth circuit. The Oregon Railroad and Navigation Company *et al.*, appellants, *v.* Robert Balfour *et al.*, respondents. Order allowing appeal of the Oregon Railroad & Navigation Company. Filed Apr. 6, 1899. Frank D. Monckton, clerk U. S. circuit court of appeals for the ninth circuit, by Meredith Sawyer, deputy clerk.

1130 In the United States Circuit Court of Appeals for the Ninth Circuit.

THE OREGON RAILROAD & NAVIGATION COMPANY, THE OREGON Railway & Navigation Company, and The Oregon Short Line & Utah Northern Railway Company, Appellants,
*v.*
ROBERT BALFOUR ET AL., Partners, Doing Business as Balfour, Guthrie & Co.; Malvina Short, Administratrix of Marshall B. Short, Deceased; Sven Anderson, Administrator of John August Peterson, Deceased, and Anna C. Larsen, Respondents.

Order allowing appeals of the Oregon Railway & Navigation Company and the Oregon Short Line & Utah Northern Railway Company from the decrees of the United States circuit court of appeals.

It appearing that the Oregon Railway & Navigation Company and the Oregon Short Line & Utah Northern Railway Company heretofore filed in the United States circuit court of appeals for the ninth circuit their petition praying for an order allowing an appeal to the Supreme Court of the United States from the decree heretofore entered in the above-entitled cause by the United States circuit court of appeals for the ninth circuit on the 3rd day of October, 1898, affirming the decree made and entered in the above-entitled cause by the district court of the United States for the district of Oregon on August 2nd, 1897, and vacated and re-entered on December 20th, 1897, and for an order allowing an appeal from the decree heretofore entered in the above-entitled proceeding by the United States circuit court of appeals on February 10th, 1896, reversing the decree of the district court of the United States for the district of Oregon entered in said district court on the 19th day of Feb-
1131 ruary, 1894, which said decree of said district court was on the 26th day of February, 1894, duly modified by the order of said district court, and praying the court to fix the amount of the bond to be given by them on such appeal; and

It appearing that assignments of error have been heretofore filed in the said United States circuit court of appeals in connection with said petition:

Now, therefore, it is ordered that the prayer of said petition be granted and the said Oregon Railway & Navigation Company and the said Oregon Short Line & Utah Northern Railway Company be, and each of them are hereby, allowed to take appeals as prayed for in said petition, upon giving a bond for costs on such appeal in the sum of five hundred ($500) dollars.

Dated at Portland, Oregon, this 4th day of April, 1899.

WILLIAM B. GILBERT, *Judge.*

(Endorsed:) No. 435. In the United States circuit court of appeals for the ninth circuit. The Oregon Railroad & Navigation Company *et al.*, appellants, *v.* Robert Balfour *et al.*, respondents.

Order allowing appeals of the O. R'y & N. Co. and the O. S. — & U. N. R'y Co. Filed Apr. 6, 1899. Frank D. Monckton, clerk U.S. circuit court of appeals for the ninth circuit, by Meredith Sawyer, deputy clerk.

1132 In the United States Circuit Court of Appeals for the Ninth Circuit.

THE OREGON RAILROAD & NAVIGATION COMPANY, THE OREGON Railway & Navigation Company, and The Oregon Short Line & Utah Northern Railway Company, Appellants,

*v.*

ROBERT BALFOUR ET AL., Partners, Doing Business as Balfour, Guthrie & Co.; Malvina Short, Administratrix of Marshall B. Short, Deceased; Sven Anderson, Administrator of John August Peterson, Deceased, and Anna C. Larsen, Respondents.

Know all men by these presents that we, The Oregon Railroad & Navigation Company and W. M. Ladd, are held and firmly bound unto Robert Balfour, Stephen Williamson, Alexander Guthrie, Robert Brodie Forman, R. Bruce, and Walter J. Burns, partners as Balfour, Guthrie & Co., and Malvina Short, administratrix of the estate of Marshall B. Short, deceased; Sven Anderson, administrator of the estate of John August Peterson, deceased; Anna C. Larsen, the Oregon Railway & Navigation Company, and the Oregon Short Line & Utah Northern Railway Company, in the sum of three thousand ($3,000) dollars, to be paid to them, their executors, administrators, successors, or assigns; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, administrators, successors, and assigns, firmly by these presents.

Sealed with our seals and dated this 4th day of April, 1899.

Whereas the above-named The Oregon Railroad & Navigation Company prosecuted an appeal to the Supreme Court of the United States to reverse the decree entered in the above-entitled pro-

1133 ceeding by the United States circuit court of appeals for the ninth circuit on the third day of October, 1898, affirming the decree of the district court of the United States for the district of Oregon, made and entered in said district court on August 2nd, 1897, and vacated and re-entered in said court on the 20th day of December, 1897:

Now, therefore, the condition of this obligation is such that if the above-named the said The Oregon Railroad & Navigation Company shall prosecute said appeal to effect and answer all damages and costs if it shall fail to make said appeal good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

THE OREGON RAILROAD & NAVIGATION COMPANY,
By W. W. COTTON,
*Its Proctor and General Attorney.*
W. M. LADD. [SEAL.]

STATE OF OREGON, } ss:
*County of Multnomah,* }

I, W. M. Ladd, being first duly sworn, depose and say that I am a resident and householder within the district of Oregon and am worth the sum of six thousand ($6,000) dollars over and above my just debts and liabilities, exclusive of property exempt from execution.

W. M. LADD.

Subscribed and sworn to before me this 4th day of April, 1899.

H. F. CONNER,
*Notary Public in and for Oregon.*

The above bond and surety thereto is hereby approved this 4th day of April, 1899.

WILLIAM B. GILBERT,
*Circuit Judge.*

(Endorsed:) No. 435. In the United States circuit court of appeals for the ninth circuit. The Oregon Railroad & Navigation Company *et al.*, appellants, *v.* Robert Balfour *et al.*, respondents. O. R'd & N. Co. bond. Filed Apr. 6, 1899. Frank D. Monckton, clerk U. S. circuit court of appeals for the ninth circuit, by Meredith Sawyer, deputy clerk.

1134 In the United States Circuit Court of Appeals for the Ninth Circuit.

THE OREGON RAILROAD & NAVIGATION COMPANY, THE OREGON Railway & Navigation Company, and The Oregon Short Line & Utah Northern Railway Company, Appellants,
*v.*
ROBERT BALFOUR ET AL., Partners, Doing Business as Balfour, Guthrie & Co.; Malvina Short, Administratrix of Marshall B. Short, Deceased; Sven Anderson, Administrator of John August Peterson, Deceased, and Anna C. Larsen, Respondents.

Know all men by these presents that we, The Oregon Railway & Navigation Company and The Oregon Short Line & Utah Northern Railway Company, as principals, and W. M. Ladd, as surety, are held and firmly bound unto Robert Balfour, Stephen Williamson, Alexander Guthrie, Robert Brodie Forman, R. Bruce, and Walter J. Burns, partners as Balfour, Guthrie & Co., and Malvina Short, administratrix of the estate of Marshall B. Short, deceased; Sven Anderson, administrator of the estate of John August Peterson, deceased; Anna C. Larsen, and the Oregon Railroad & Navigation Company in the sum of five hundred ($500) dollars, to be paid to them, their executors, administrators, successors, or assigns; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, ex-

ecutors, administrators, successors, and assigns, firmly by these presents.

Sealed with our seals and dated this 4th day of April, 1899.

Whereas the above-bounden The Oregon Railway & Navigation Company and The Oregon Short Line & Utah Northern Railway Company and each of them prosecuted an appeal to the Supreme Court of the United States to reverse the decree entered in
1135 the above-entitled proceeding by the United States circuit court of appeals for the ninth circuit on the third day of October, 1898, affirming the decree made and entered in the above-entitled cause by the district court of the United States for the district of Oregon on August 2nd, 1897, and vacated and re-entered on December 20, 1897, and from the decree entered in the above-entitled proceeding by the said United States circuit court of appeals on February 10th, 1896, reversing the decree of the district court of the United States for the district of Oregon entered in said district court on the 19th day of February, 1894, which said decree of said district court was, on the 26th day of February, 1894, duly modified by the order of said district court:

Now, therefore, the condition of this obligation is such that if the above-named The Oregon Railway & Navigation Company and The Oregon Short Line & Utah Northern Railway Company and each of them shall prosecute said appeal to effect and answer all costs if they or either of them shall fail to make said appeal good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

THE OREGON RAILWAY & NAVIGATION COMPANY,
By W. W. COTTON, *Its Proctor.*
THE OREGON SHORT LINE & UTAH NORTHERN RAILWAY COMPANY,
By W. W. COTTON, *Its Proctor.*
W. M. LADD. [SEAL.]

STATE OF OREGON, }
*County of Multnomah,* } ss:

I, W. M. Ladd, being first duly sworn, depose and say that I am a resident and householder within the district of Oregon and am worth the sum of one thousand ($1,000) dollars over and
1136 above my just debts and liabilities, exclusive of property exempt from execution.

W. M. LADD.

Subscribed and sworn to before me this 4th day of April, 1899.
H. F. CONNER,
*Notary Public in and for Oregon.*

The above bond and surety thereto is hereby approved this 4th day of April, 1899.

WILLIAM B. GILBERT,
*Circuit Judge.*

(Endorsed:) No. 435. In the United States circuit court of appeals for the ninth circuit. The Oregon Railroad & Navigation Company *et al.*, appellants, *v.* Robert Balfour *et al.*, respondents. O. R'y & N. Co. bond. Filed Apr. 6, 1899. Frank D. Monckton, clerk U. S. circuit court of appeals for the ninth circuit, by Meredith Sawyer, deputy clerk.

1137 In the United States Circuit Court of Appeals for the Ninth Circuit.

THE OREGON RAILROAD & NAVIGATION COMPANY, THE OREGON Railway & Navigation Company, and The Oregon Short Line & Utah Northern Railway Company, Appellants,

*v.*

ROBERT BALFOUR ET AL., Partners, Doing Business as Balfour, Guthrie & Co.; Malvina Short, Administratrix of Marshall B. Short, Deceased; Sven Anderson, Administrator of John August Peterson, Deceased, and Anna C. Larsen, Respondents.

UNITED STATES OF AMERICA, *State of Oregon*, } *ss*:

To Robert Balfour, Stephen Williamson, Alexander Guthrie, Robert Brodie Forman, R. Bruce, and Walter J. Burns, partners, doing business as Balfour, Guthrie & Co., and Malvina Short, administratrix of the estate of Marshall B. Short, deceased; Sven Anderson, administrator of the estate of John August Peterson, deceased, and Anna C. Larsen, mother of John August Peterson, deceased; the Oregon Short Line & Utah Northern Railway Company, and the Oregon Railway & Navigation Company:

You and each of you are hereby notified that in the above-entitled proceeding an appeal has been allowed to the
1138 & 1139 Oregon Railroad & Navigation Company to the Supreme Court of the United States from the decree heretofore entered by the United States circuit court of appeals for the ninth circuit in the above-entitled cause on the 3rd day of October, 1898, affirming the decree of the district court of the United States for the district of Oregon, made and entered in the said district court on the 20th day of December, 1897, said decree so affirmed being in favor of said Robert Balfour, Stephen Williamson, Alexander Guthrie, Robert Brodie Forman, R. Bruce, and Walter J. Burns, partners, doing business as Balfour, Guthrie & Co., and Malvina Short, administratrix of the estate of Marshall B. Short, deceased; Svan Anderson, administrator of the estate of John August Peterson, deceased, and you and each of you are hereby cited and admonished to be and appear at and before the Supreme Court of the United States, at Washington, within sixty days from the date hereof, to show cause, if any there be, why the said decree of the said United States circuit court of appeals should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable William B. Gilbert, circuit judge and one

of the justices of the United States circuit court of appeals for the ninth circuit, this 4th day of April, in the year of our Lord one thousand eight hundred and ninety-nine.

WILLIAM B. GILBERT,
*Circuit Judge.*

Due and regular service of the foregoing citation is hereby accepted this 4th day of April, 1899.

E. B. WATSON,
*Proctors for Malvina Short, Administratrix of the Estate of Marshall B. Short, Deceased; Sven Anderson, Administrator of the Estate of John August Peterson, Deceased, and Anna C. Larsen.*

COTTON, TEAL & MINOR,
*Proctors for the Oregon Railway & Navigation Company and the Oregon Short Line & Utah Northern Railway Company.*

WILLIAMS, WOOD & LINTHICUM,
*Proctors for Robert Balfour, Stephen Williamson, Alexander Guthrie, Robert Brodie Forman, R. Bruce, and Walter J. Burns, Partners, Doing Business as Balfour, Guthrie & Co.*

[Endorsed:] Dock. No. 435. In the United States circuit court of appeals for the ninth circuit. The Oregon Railroad & Navigation Company *et al.*, appellants, *v.* Robert Balfour *et al.*, respondents. Citation. Filed Apr. 6, 1899. Frank D. Monckton, clerk, by Meredith Sawyer, deputy clerk.

1140 In the United States Circuit Court of Appeals for the Ninth Circuit.

THE OREGON RAILROAD & NAVIGATION COMPANY, THE OREGON Railway & Navigation Company, and The Oregon Short Line & Utah Northern Railway Company, Appellants,

*v.*

ROBERT BALFOUR ET AL, Partners, Doing Business as Balfour, Guthrie & Co.; Malvina Short, Administratrix of Marshall B. Short, Deceased; Sven Anderson, Administrator of John August Peterson, Deceased, and Anna C. Larsen, Respondents.

UNITED STATES OF AMERICA, *State of Oregon*, } *ss:*

To Robert Balfour, Stephen Williamson, Alexander Guthrie, Robert Brodie Forman, R. Bruce, and Walter J. Burns, partners, doing business as Balfour, Guthrie & Co.; Malvina Short, administratrix of the estate of Marshall B. Short, deceased; Sven Anderson, administrator of the estate of John August Peterson, deceased; Anna C. Larsen, mother of John August Peterson, deceased, and the Oregon Railroad & Navigation Company:

You and each of you are hereby notified that in the above-entitled proceeding appeals have been allowed to the Oregon Railway &

Navigation Company and the Oregon Short Line & Utah Northern Railway Company to the Supreme Court of the United States from the decree heretofore entered by the United States circuit court of appeals for the ninth circuit in the above-entitled cause on the 3rd day of October, 1898, affirming the decree of the district court of the United States for the district of Oregon, made and entered in the said district court on the 20th day of December, 1897, and from the decree entered in the above-entitled proceeding by the United States circuit court of appeals on February 10th, 1896, reversing the decree of the district court of the United States for the district of Oregon entered in said district court on the 19th day of February, 1894, which said decree of said district court was on the 26th day of February, 1894, duly modified by the order of said district court; and you and each of you are hereby cited and admonished to be and appear at and before the Supreme Court of the United States, at Washington, within sixty days from the date hereof, to show cause, if any there be, why the said decrees and each of them of the United States circuit court of appeals should not be corrected and why speedy justice should not be done to the parties in that behalf.

1141 & 1142

Witness the Honorable William B. Gilbert, circuit judge and one of the justices of the United States circuit court of appeals for the ninth circuit, this 4th day of April, in the year of our Lord one thousand eight hundred and ninety-nine.

WILLIAM B. GILBERT,
*Circuit Judge.*

Due and regular service of the foregoing citation is hereby accepted this 4th day of April, 1899.

E. B. WATSON,
*Proctor for Malvina Short, Administratrix of the Estate of Marshall B. Short, Deceased; Sven Anderson, Administrator of the Estate of John August Peterson, Deceased, and Anna C. Larsen.*

COTTON, TEAL & MINOR,
*Proctors for the Oregon Railroad & Navigation Company.*

WILLIAMS, WOOD & LINTHICUM,
*Proctors for Robert Balfour, Stephen Williamson, Alexander Guthrie, Robert Brodie Forman, R. Bruce, and Walter J. Burns, Partners, Doing Business as Balfour, Guthrie & Co.*

[Endorsed:] Dock. No. 435. In the United States circuit court of appeals for the ninth circuit. The Oregon Railroad & Navigation Company *et al.*, appellants, *v.* Robert Balfour *et al.*, respondents. Citation. Filed Apr. 6, 1899. Frank D. Monckton, clerk, by Meredith Sawyer, deputy clerk.

1143 United States Circuit Court of Appeals for the Ninth Circuit.

MALVINA SHORT, Administratrix of the Estate of Marshall B. Short, Deceased; Sven Anderson, Administrator of the Estate of John August Peterson, Deceased, and Robert Balfour, Stephen Williamson, Alexander Guthrie, Robert Brodie Forman, R. Bruce, and Walter J. Burns, Partners as Balfour, Guthrie & Co., Appellants,

*v.*

THE BARGE "COLUMBIA," ETC.; OREGON RAILWAY & Navigation Company and The Oregon Short Line & Utah Northern Railway Company, Appellees.

No. 172.

OREGON RAILROAD AND NAVIGATION COMPANY ET AL., Appellants,

*v.*

ROBERT BALFOUR ET AL., Appellees,

and

No. 435.

ROBERT BALFOUR ET AL., Appellants,

*v.*

OREGON RAILROAD AND NAVIGATION COMPANY ET AL., Appellees.

I, Frank D. Monckton, clerk of the United States circuit court of appeals for the ninth circuit, do hereby certify the foregoing one thousand one hundred and forty-two (1,142) pages, numbered from one (1) to one thousand one hundred and forty-two (1,142), inclusive, to be a true copy of the record and of the assignments of errors and of all proceedings in said United States circuit court of appeals, including the opinions filed in the above-entitled cases, as the originals thereof remain and appear of record in said United States circuit court of appeals.

Attest my hand and the seal of said United States circuit court of appeals for the ninth circuit, at San Francisco, California, this 18th day of April, A. D. 1899.

[Seal United States Circuit Court of Appeals, Ninth Circuit.]

F. D. MONCKTON, *Clerk.*

[Ten-cent U. S. internal-revenue stamp, cancelled April 18, '99. F. D. M., cl'k.]

Endorsed on cover: File No., 17,427. U. S. C. C. of appeals, 9th circuit. Term No., 313. The Oregon Railroad & Navigation Company, appellant, *vs.* Robert Balfour *et al.*, partners, doing business as Balfour, Guthrie & Co., *et al.* And file No., 17,428. Term No., 314. The Oregon Railway and Navigation Company and The Oregon Short Line and Utah Northern Railway Co., appellants, *vs.* Robert Balfour *et al.*, partners, doing business as Balfour, Guthrie & Co., *et al.* Filed May 25, 1899.

No. 73-

Office Sup. Court U.S.
FILED
SEP 22 1900
JAMES H. McKENNEY,
Clerk

Brf. of Cotton & Browne for Co. & Co.

IN THE

# SUPREME COURT

Filed Sept. 22, 1900.

IN THE

## UNITED STATES.

OCTOBER TERM, 1899.

THE OREGON RAILROAD & NAVIGATION COMPANY, *Appellant*,
*v.*
ROBERT BALFOUR, *et al.*, partners doing business as BALFOUR, GUTHRIE & COMPANY, *et al.* — No. 313.

THE OREGON RAILWAY & NAVIGATION COMPANY and THE OREGON SHORT LINE & UTAH NORTHERN RAILWAY COMPANY, *Appellants*,
*v.*
ROBERT BALFOUR, *et al.*, partners doing business as BALFOUR, GUTHRIE & COMPANY, *et al.* — No. 314.

## Brief for the Oregon Railroad & Navigation Company.

W. W. COTTON,
*for Appellants.*

A. B. BROWNE,
*Of Counsel.*

PORTLAND, OREGON:
F. W. BALTES AND COMPANY, PRINTERS, 228 OAK STREET.
1900.

IN THE

# SUPREME COURT

OF THE

## UNITED STATES.

OCTOBER TERM, 1899.

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| THE OREGON RAILROAD & NAVIGATION COMPANY, *Appellant*, v. ROBERT BALFOUR, *et al.*, partners doing business as BALFOUR, GUTHRIE & COMPANY, *et al.* | No. 313. |
| THE OREGON RAILWAY & NAVIGATION COMPANY and THE OREGON SHORT LINE & UTAH NORTHERN RAILWAY COMPANY, *Appellants*, v. ROBERT BALFOUR, *et al.*, partners doing business as BALFOUR, GUTHRIE & COMPANY, *et al.* | No. 314. |

## Brief for the Oregon Railroad & Navigation Company.

In October, 1892, the barge Columbia and the steamer Ocklahama were owned by the Oregon Railway & Navigation Company, but were leased to the Oregon Short Line & Utah Northern Railway Company for a period of ninety-nine years, and the Oregon Short Line & Utah Northern Railway Company was exclusively operating said barge and steamer. On the 19th

of October, 1892, Balfour, Guthrie & Co. loaded upon the barge Columbia a cargo of wheat to be transported upon said barge from Portland, Oregon, to Astoria, Oregon. The barge was under the charge of a captain who had no connection with any boat or vessel other than the Columbia, and the captain of said barge, for and on behalf of said company, executed and delivered to Balfour, Guthrie & Co. a shipping receipt for the wheat so loaded. Afterwards, but on the same day, the Columbia was taken in tow by some boat or vessel other than the Ocklahama, and was towed from the dock at which she had been loaded to a point or place in the City of Portland, known as the "boneyard," and there remained from the 19th of October, 1892, until the afternoon of the 21st of October. During the afternoon of the 21st of October, the Ocklahama took the Columbia in tow for the purpose of towing the Columbia from the boneyard in Portland to the dock at Astoria of the Oregon Railway & Navigation Company, then operated by the Oregon Short Line & Utah Northern Railway Company. Marshal B. Short was captain of the Ocklahama, and John August Peterson was a deckhand on the Ocklahama. While making a landing at the dock at Astoria, the Columbia struck a floating pontoon, which was kept next the wharf as a fender, and the Columbia sprung a leak. The persons in charge of the Columbia deemed it advisable to remove the barge into more shallow water, and the barge was therefore taken behind the dock, where she rested on the bottom of the Columbia river and was listed against the dock in a safe position. Afterwards, the master of the barge, one Ferguson, caused a portion of the cargo to be shifted until the barge was on an even keel and was no

longer resting against the dock. At the time the cargo was shifted the tide was ebbing and after the barge came to an even keel she rested in that position for a short time, when, the tide having ebbed and the barge having no lateral support, she keeled over away from the dock, striking her bilge on the bottom of said river with great force, causing the cargo to shift and carry away her deckhouse, and a large part of the cargo slid into the river, and the hull of the barge was broken down by the shock. Marshal B. Short and John August Peterson, who were in the hull of the barge, were killed. After the accident, the Oregon Railway & Navigation Company and the Oregon Short Line & Utah Northern Railway Company, as lessee, filed in the District Court of the United States for the District of Oregon their petition praying for a limitation of the personal liability of the petitioners arising out of the damage done by the destruction of the Columbia. (Record, p. 1.)

No attempt was made to limit their liability as owners of the Ocklahama, and no offer to surrender the Ocklahama was made.

In that petition it was alleged:

That the Oregon Railway & Navigation Company was a corporation organized under the laws of the State of Oregon; and, as such corporation, was the owner of a certain barge or lighter operated upon the Columbia and Willamette rivers, known as the Columbia; that the Oregon Short Line & Utah Northern Railway Company was a corporation duly organized and existing under and by virtue of an act of congress of the United States entitled "An act creating the Oregon Short Line Railway Company, a corpration, in the Territories of

Utah, Idaho and Wyoming, and for other purposes," approved August 2, 1882; and, as such corporation, was engaged in the business of owning and operating steamboats and other vessels, barges and lighters between Portland, in the State of Oregon, and Astoria, in said state, and was, during all the times mentioned in the said petition, the lessee from the Oregon Railway & Navigation Company for a period of ninety-nine years from the 1st day of January, 1887, of the barge Columbia, and was, during all the times mentioned in said petition, operating said barge Columbia, and had the sole and exclusive possession, charge, control and management of the said barge; that, on the 21st day of October, 1892, the said barge Columbia left Portland, having on board a cargo of wheat to be transported by said barge from Portland, Oregon, to Astoria, Oregon, said wheat being part of the cargo of the British ship Westgate, and destined to be transported by means of said ship and lighter from Portland, Oregon, to Liverpool, England. That all went well with said barge until said barge, on the night of the 21st day of October, reached Astoria, at which point the said barge intended to tie up alongside the dock of the Oregon Railway & Navigation Company; that lying in front of said dock and floating nearly level with the water, was a pontoon; that the darkness of the night rendered it impossible for the pilot in charge of the Ocklahama, a steamboat towing said barge, to see the said pontoon, and, in attempting to make a landing at said dock, the barge ran against said pontoon with sufficient force to break the stem of the said barge and to start her timbers to such an extent that the barge commenced leaking; that said barge was thereupon taken behind said dock and placed alongside the rear

portion thereof, and, after an examination had been made, it was found that the barge would, probably, float if the pumps were used, and thereupon the men in charge of the barge commenced using the pumps, and kept the leak under control; that the cargo upon said barge was entirely loaded upon her deck, as it was customary in vessels of her character, and, at the time the pumps were working, no part of the cargo of the said barge was injured in any manner whatsoever; that the man in charge of said barge undertook to stop the leak by building a bulkhead; that, in order to aid in the work of the building of said bulkhead, three men, among others, entered the hold of the barge; that these men were Marshal Short, the captain of the Ocklahama; William Boyce and Gus Peterson, both deckhands on the Ocklahama; that the tide, at this time, was ebbing, and, while the men were in the hold of the barge, the same touched ground; that an examination was thereupon made by the men in charge of the said barge as to her condition and position, and such men thereupon concluded to continue with the work of undertaking to stop the said leak, believing that the barge would sink into the mud and remain upright; that, as the tide continued to fall, the barge suddenly listed to one side away from the said dock, and partially turned over; that said Marshal Short and Gus Peterson were caught by the falling cargo of the said barge, consisting of wheat in sacks, and were killed; that a large amount of the cargo of the barge was thrown into the water, and the barge subjected to such a severe strain that her house was carried away and her hull damaged; that William Boyce claimed to have been injured by being thrown down as the result of the listing of the said barge; that said

accident happened, and the loss and damage above set forth were occasioned, without the fault, privity or knowledge of the petitioners, or either of them, and were due solely to the perils of the sea.

The said petition then alleged that the administratrix of Gus Peterson, and the firm of Balfour, Guthrie & Co., owners of the cargo, were threatening to commence actions against the petitioners to recover damages claimed to have been suffered by said accident; and that William Boyce had commenced an action against the petitioners in the Circuit Court of the State of Oregon for Multnomah County, to recover damages alleged to have been suffered by him, and that said action was then pending; that the claims so made by said Peterson were largely in excess of the value of the barge; that the petitioners, and each of them, desire to contest their liability for damages caused by the said accident, and, also, to claim the benefit of the limitation of liability provided in the third and fourth sections of the act of congress, entitled "An act to limit the liability of shipowners, and for other purposes," approved March 3, 1851, now embodied in sections 4283 and 4285 of the Revised Statutes of the United States, and of the various statutes in addition thereto and amendatory thereof, and particularly the act of congres approved June 19, 1886, and to that end prayed that an appraisement might be had of the value of the barge Columbia, and of her freight, then pending.

The petition then proceeds to state the facts by which exemption from liability is claimed in addition to the facts thereinbefore alleged. On behalf of the Oregon Railway & Navigation Company, it was alleged that the barge Columbia had been leased by it for a period

of ninety-nine years to the Oregon Short Line & Utah Northern Railway Company, and that, under said lease, the Oregon Short Line & Utah Northern Railway Company had entered into the use and enjoyment of said barge, and that the barge, at the time of the accident, was in the sole and exclusive management and control of the Oregon Short Line & Utah Northern Railway Company, and that none of the men on board of the said barge were officers or agents of the Oregon Railway & Navigation Company; that the wheat destroyed, belonging to Balfour, Guthrie & Co., was being carried by the Oregon Short Line & Utah Northern Railway Company under and by virtue of a bill of lading issued by that company, and was not being carried, handled or controlled in any manner whatsoever by the Oregon Railway & Navigation Company.

On behalf of the Oregon Short Line & Utah Northern Railway Company, it was alleged that the Columbia was staunch and seaworthy, and properly manned and equipped for the voyage in which she was engaged, and was under the charge and management of proper and suitable officers. That the captain of the barge Columbia executed and delivered to Balfour, Guthrie & Co. a shipping receipt or bill of lading for all the wheat carried upon said barge, and that said receipt contained a provision exempting the Oregon Short Line & Utah Northern Railway Company from all injuries not caused by the actual negligence of the said company or its agents; that the agreement contained in said receipt was signed by said Balfour, Guthrie & Co., owners of the said wheat, and that said wheat was carried under the terms and provisions of said shipping receipt,

and not otherwise; that the injury to said wheat did not occur by reason of any negligence on the part of either of the petitioners or any of their agents or servants, but was caused solely by a peril over which the petitioners had no control.

It was alleged in the petition that Short, Boyce and Peterson well knew of the danger of working in the hold of the said barge, and that each of said persons was guilty of negligence contributing to his injury.

The petition then prayed that an appraisement might be had of the Columbia, that a monition should issue against all persons claiming damages for any loss, damage or injury occasioned by the said accident, citing them to appear before the court and make proof of their claims, and that, in the meantime, and until the final judgment of the court, an order be made restraining the further prosecution of any and all suits against the petitioners.

Upon the filing of the petition, the District Court appointed appraisers to ascertain the value of the Columbia (Transcript of Record, p. 8), and these appraisers determined the value of the barge to be $100.00 (Transcript of Record, p. 9). On December 6, 1892, the Oregon Railway & Navigation Company and Oregon Short Line & Utah Northern Railway Company gave a bond for the appraised value of the barge (Transcript of Record, p. 10), and, on the 12th day of December, 1892, the District Court made an order reciting the proceedings already had, and the desire of the petitioners to limit their liability and, at the same time, to contest the same and that of the barge Columbia, and ordered that "the prosecution of all suits and proceedings against the Oregon Short Line

& Utah Northern Railway Company or the Oregon Railway & Navigation Company, in respect to any claim for damages for any loss, destruction, damage or injury occasioned on the 21st and 22d days of October, 1892, or her (the barge Columbia's) loss or destruction, be and the same is hereby, restrained." (Record, p. 12.)

Balfour, Guthrie & Co., the owners of the wheat lost (Record, p. 17), Malvina Short, as administratrix of the estate of Marshal B. Short (Record, p. 28), Sven Anderson, as administrator of the estate of John August Peterson (Record, p. 32), Annie C. Larson, mother of John August Peterson (Record, p. 38), and William Boyce (Record, p. 22), appeared in the proceeding and filed answers to the petition and resisted the claim of petitioners to a limitation of liability.

The answer of Balfour, Guthrie & Co. admits the incorporation of the petitioners, as alleged in the petition, and the making of the lease of the Columbia to the Oregon Short Line & Utah Northern Railway Company, and admits that the Oregon Short Line & Utah Northern Railway Company was at the time of the accident operating the Columbia and had the sole and exclusive possession, charge, control and management of the barge, and admits the contract for the carriage of the wheat. The answer then alleges, among other things, that the barge was not sound, staunch or seaworthy at the time she was loaded for the voyage in question; that her cargo was carelessly, negligently and improperly loaded, and that the barge was, in fact, overloaded; that the barge was insufficiently manned and equipped, and her crew were without the necessary skill and experience for the business in which she was

engaged; that all these matters were, at the time, well known to the owners, their officers, agents and employes; that both the tug Ocklahama and the barge were so negligently handled at the time of the landing of the barge at the dock at Astoria, that the bow of the barge was stove in, and that, in removing her to the inside of the dock, the petitioners were guilty of negligence and unskillfulness. The amendment to the answer made by the stipulation (Transcript of Record, p. 82), alleges, among other things, that the Ocklahama had not been surrendered. The answer prays that the appraisement of the Columbia be set aside and "that the respondent be decreed to recover from said libelants and petitioners the full amount of their damage in this behalf sustained," and for such other relief as to the court shall deem meet.

An amendment to this answer was made by stipulation (Record, p. 82), by which amendment it was alleged, among other things, that the Columbia had not been surrendered.

The answers of Malvina Short, administratrix, Sven Anderson, administrator, and Anna C. Larsen are all similar in form, and admit the incorporation of the petitioners as alleged, and admit that the Oregon Short Line & Utah Northern Railway Company was, at the time of the accident, operating the barge Columbia under the lease, and had the sole and exclusive possession, charge, control and management of the said barge; and admit that the Columbia was well manned and properly managed, but deny that the Columbia was seaworthy or properly loaded. After various other admissions and denials, the answers allege the incorporation of the Oregon Short Line & Utah Northern Rail-

way Company, and that said company, at the time of the accident, was in the use and possession of the Columbia; that the Columbia was old, rotten and leaky, and without suitable pumps, and that the said Oregon Short Line & Utah Northern Railway Company had knowledge of such facts; that the said Oregon Short Line & Utah Northern Railway Company, with such knowledge, negligently and carelessly loaded said barge far beyond the capacity of said barge to carry with safety in its then condition, and that, by reason of the unsound and unsafe condition of said barge, the accident to Short and Peterson occurred. The answer of Malvina Short prays that the order and monition be set aside, and that a personal judgment be rendered "against said libelants for $5,000.00." The answer of Sven Anderson prays that the order and monition be set aside, and that personal judgment be entered "against the said libelants (the Oregon Short Line & Utah Northern Railway Company) for $5,000.00"; and the answer of Anna C. Larsen prays that the order and monition be set aside, and that personal judgment be given "against the said libelants (the Oregon Short Line & Utah Northern Railway Company) for the sum of $6,000.00."

In and by neither of said answers of the respondents was any relief sought *in rem* against the steamer Ocklahama; but in and by each of said answers, as hereinbefore alleged, judgments *in personam* were prayed against the Oregon Short Line & Utah Northern Railway Company or against the Oregon Short Line & Utah Northern Railway Company and the Oregon Railway & Navigation Company.

The allegations of the answer of William Boyce are

not material, for the reason that no final decree was made in his favor (see decree of December 20, 1897, Record, p. 516); he having, prior to final decree, accepted the amount allwed him by decree of February 26, 1894 (Record, p. 84).

Testimony was taken before Bellinger, district judge (Record, pp. 103-387), and, after argument, that judge handed down a written opinion (Record, p. 86), in which the conclusion was reached that the petitioners were entitled to limit their liability to the value of the Columbia. As the result of this opinion, a decree to that effect was entered February 19, 1894 (Record, p. 84). By this decree the petitioners were ordered to pay into court $100.00, and the clerk of the court was ordered to distribute this amount, and to pay one-third thereof to Balfour, Guthrie & Co., one-third thereof to William Boyce, and one-third thereof to Malvina Short, Sven Anderson and Anna C. Larsen.

From this decree Malvina Short, as administratrix, Sven Anderson, as administrator, and Balfour, Guthrie & Co. appealed (Record, p. 91), and their appeal was allowed (Record, p. 100). The appeal was taken by Balfour, Guthrie & Co. in their firm name, without specifying the names of the persons constituting the partnership. No citation issued upon this appeal, but a notice signed by the proctors for the persons appealing, and directed to the Oregon Railway & Navigation Company and the Oregon Short Line & Utah Northern Railway Company, and their proctor was served. No service of any citation or notice was made upon William Boyce or Anna C. Larsen, and no appeal was taken by either Boyce or Larsen.

Said cause on said appeal to the Circuit Court of

Appeals was entitled "Malvina Short, administratrix, etc., Sven Anderson, administrator, etc., and Balfour, Guthrie & Co., appellants, vs. the barge Columbia, etc., Oregon Railway & Navigation Company and the Oregon Short Line & Utah Northern Railway Company," and numbered 172 on the docket of said Circuit Court of Appeals.

When the appeal came on for hearing in the Circuit Court of Appeals, the Oregon Railway & Navigation Company and the Oregon Short Line & Utah Northern Railway Company moved the court to dismiss the appeal upon the grounds: First, the proceedings were irregular, because the appeal was taken by Balfour, Guthrie & Co. in their firm names, without naming the individuals composing the firm; and, second, because the decree was a joint decree, and Boyce and Larsen had not joined in the appeal, had not taken an appeal, and had not been barred of their right to appeal by any proceedings in the nature of summons and severance.

The motion to dismiss the appeal was heard by McKenna, the then circuit judge, and Hanford and Hawley, district judges, and the appeal was dismissed (Record, p. 399). The opinion of the court was delivered by Hanford, district judge, and will be found in the Record, page 388. The appellants moved for a rehearing, and this was granted (Record, p. 391). On the rehearing, an argument was had before McKenna, Gilbert and Ross, circuit judges. The motion to dismiss the appeal was overruled, and the decree of the District Court reversed, and the cause remanded to the District Court for further proceedings (Record, p. 406). The opinion of the court was delivered by Ross, circuit judge, and will be found in the Record, page 393. Mr.

Justice McKenna dissented from the conclusion of the court overruling the motion to dismiss the appeal, but concurred in the conclusion of the court as to the merits (Record, p. 406). Upon the motion to dismiss the appeal, the majority of the court held that the claims of each of the parties affected by the decree of the District Court were separate and distinct, and that the parties having such claims were not jointly affected by the decree.

As stated in the opinion of the Circuit Court of Appeals (Record, p. 404), the principal reasons assigned by the respondents against allowing the Oregon Short Line & Utah Northern Railway Company and the Oregon Railway & Navigation Company to limit their liability to the value of the barge were, first, that the Columbia was, from the inception of the voyage, unseaworthy; and, second, that the Columbia and the Ocklahama were, in law, one vessel; and that, in order to avail themselves of the benefit of the limited liability act, the owners must surrender the Ocklahama as well as the Columbia in satisfaction of the loss and damage complained of. Upon the question of the seaworthiness of the barge and the cause of the accident, the District Court in its decree made the following findings of fact (Record, p. 84):

"First. That on October 21, 1892, the barge Columbia, being loaded with 8,898 sacks of wheat on her deck, owned by the respondents Balfour, Guthrie & Co., was taken in tow by the steamer Ocklahama at Portland, Oregon, and by her towed to Astoria, Oregon, said barge and steamer being owned by the petitioners herein.

"Second. That said barge and steamer arrived in

safety at Astoria during the night of said October 21, but that in making a landing the stem of said barge struck a floating pontoon, which was kept next the wharf as a fender, with such force as to cause said barge to spring a leak. That said leak was not considered serious or dangerous by those in charge of the said barge, and was not serious or dangerous.

"Third. That said barge, about half an hour after striking said pontoon, was moved to a position behind said wharf, where she rested on the bottom of the Columbia river, which was there composed of soft mud, and being listed against the dock was in a safe position.

"Fourth. That Marshal Short, master of said Ocklahama, and Gus Peterson, one of the crew of said Ocklahama, thereupon descended into the hold of said barge for the purpose of building a bulkhead to stop said leak, and at the same time John Ferguson, master of said barge, was assisting in pumping the water out of said barge by means of a siphon, the lower end of which rested in the bottom of said barge on the side away from the dock.

"Fifth. That after the said barge had rested in this position against the dock for about an hour and a half, and while said Short and Peterson were in the hold of said barge, said John Ferguson on his own motion negligently caused the cargo on the deck of said barge to be shifted until said barge was on an even keel and was no longer resting against the dock. At this time, and for some time prior thereto, the tide in the Columbia river was ebbing.

"Sixth. That when said barge came to an even keel she remained in that position for a short time, when,

the tide having ebbed and she having no lateral support, said barge keeled over away from said dock, striking her bilge on the bottom of said river with great force, causing the cargo to shift and carry away the deckhouse, and a large portion of said cargo slid into said river, and the hull of said barge was broken down by the shock.

"Seventh. That said Short and Peterson were unable to escape from the hold of said barge, and were drowned, and said William Boyce, who was in the hold of said barge, was injured by being struck by said cargo in attempting to reach the deck of said barge.

"Eighth. That said barge was seaworthy, and was at the time of the voyage in a suitable and proper condition for the purpose for which she was being used; that she was properly manned and was not overloaded, and that the said leak caused by striking the dock was not serious or dangerous; that the position in which she was placed against the side of the dock was a proper and safe position, and that the accident was caused by the negligent shifting of the cargo on said barge by the said Ferguson, and the collapse was due to the exceptional strain to which the timbers were subjected in the unnatural position in which she was placed when thrown upon her side, and that the steamer Ocklahama did not in any way cause the said accident.

"Ninth. That John Ferguson, the master of the said barge, was a licensed mate upon the Columbia river, and there was no negligence on the part of the petitioners or either of them in employing the said John Ferguson; that the said John Ferguson occupied no position with either of the petitioners herein except that of captain of the said barge; that the said accident

resulting in the death of Short and Peterson, and injuries to Boyce, and the loss of the wheat loaded on the said barge occurred without the knowledge or privity of said petitioners or either of them."

The District Court, in the opinion delivered (Record, p. 89), held that the Ocklahama and the Columbia were not within the meaning of the limited liability act one vessel; and, having held, as stated in the eighth finding of fact contained in the decree, that the Ocklahama did not, in any way, cause the accident, it was therefore decreed that the railway companies could limit their liability to the value of the Columbia.

All of the findings of fact made by the District Court were by the Circuit Court of Appeals sustained and accepted as conclusive (Record, p. 404). The decree of the District Court was reversed solely because of the fact that the Circuit Court of Appeals was of the opinion that the Ocklahama and the Columbia constituted one vessel; that both of said vessels were pledged for the faithful performance of the contract entered into by the captain of the Columbia with Balfour, Guthrie & Co. for the transportation of their wheat; and that it was immaterial whether the officers of the Columbia or of the Ocklahama made the contract of carriage, or whether the negligence of the Columbia alone caused the accident (Record, pp. 404-406).

The cause was remanded to the District Court for further proceedings.

On March 16, 1896, Malvina Short, Balfour, Guthrie & Co. and Sven Anderson filed in the District Court the mandate of the Circuit Court of Appeals (Record, p. 429), and moved that findings of fact be made as to the damage suffered by them, and that a decree be

entered against the Oregon Short Line & Utah Northern Railway Company, the Oregon Railway & Navigation Company and the steamer Ocklahama (Record, pp. 430, 431). After this motion was argued, and before it was decided, Balfour, Guthrie & Co. obtained leave to file a supplemental answer, setting up facts arising during the pendency of the proceedings (Record, p. 434). This answer (Record, p. 434) alleges that, in a suit commenced in the Circuit Court of the United States by Oliver Ames and others against the Union Pacific Railway Company and others, including the Oregon Short Line & Utah Northern Railway Company and the Oregon Railway & Navigation Company, S. S. H. Clark and others were appointed receivers of the Union Pacific system, including, among other companies, the Oregon Railway & Navigation Company and the Oregon Short Line & Utah Northern Railway Company, and that said Clark and others, as such receivers, entered into the possession of all of the property of said companies, and proceeded to operate the same. That, on the 25th of June, 1894, there was filed in the Circuit Court of the United States for the District of Oregon a bill of complaint, wherein the Farmers' Loan & Trust Company was complainant, and the Oregon Railway & Navigation Company, the Oregon Short Line & Utah Northern Railway Company and others were defendants, alleging that the Oregon Railway & Navigation Company was insolvent, and praying for the appointment of a receiver for said corporation; and that, on the 3d day of July, 1894, in said court and cause, Edwin McNeill was appointed receiver of the Oregon Railway & Navigation Company, afterwards qualified as such, and entered into the operation of all the prop-

erty of said company. That, on the 1st day of September, 1894, in the Circuit Court of the United States for the District of Oregon, a bill of complaint was filed by John F. Dillon, as trustee, against the Oregon Short Line & Utah Northern Railway Company and others, praying, among other things, that receivers be appointed for the property of the Oregon Short Line & Utah Northern Railway Company, and that, afterwards, in said court and cause S. S. H. Clark and others were appointed such receivers, and entered into possession of all of the property of the Oregon Short Line & Utah Northern Railway Company; that the steamer Ocklahama, mentioned in the pleadings, was then in the custoday and possession of Edwin McNeill as receiver of the Oregon Railway & Navigation Company. The said supplemental answer then prayed that the Oregon Railway & Navigation Company and the Oregon Short Line & Utah Northern Railway Company be required forthwith to file a new and additional stipulation for the appraised value of the said steamer Ocklahama, at the time of the accident to the barge Columbia. To this supplemental answer (Record, pp. 437, 438) the Oregon Railway & Navigation Company and the Oregon Short Line & Utah Northern Railway Company filed exceptions, on the grounds, first, that the district court was without jurisdiction to hear and determine the matters presented by said supplemental answer, or to grant the relief, or any part of the same, prayed for in said supplemental answer; second, that the district court had no jurisdiction over the steamer Ocklahama, or over the value of said steamer; third, that the relief prayed for in said supplemental answer is not in accordance with the opinion of the said circuit court of appeals in this case,

and is inconsistent therewith; and, fourth, that, under the act of congress providing for the limitation of liability, the railway companies were not obliged to pay into the court the appraised value of the said steamer Ocklahama, or were not obliged to turn over to trustees the said steamer.

These exceptions came on to be heard, and were overruled (Record, p. 439).

On May 22, 1896, a rehearing was had upon the exceptions to the supplemental answer of Balfour, Guthrie & Co., and said exceptions were sustained (Record, p. 442), and, on motion of Balfour, Guthrie & Co., the said parties were allowed to file an amended and supplemental answer. At the same time came on for hearing a motion from Balfour, Guthrie & Co. for an order directing the marshal to seize the Ocklahama, and said motion was denied, for the reason stated, that no formal order of the court was required to warrant the marshal, as part of the proceedings in the cause, to seize and hold said steamboat. Thereupon, Balfour, Guthrie & Co. filed an amended supplemental answer (Record, p. 442). This answer makes substantially the same allegations as were made in the original supplemental answer, and to this answer (Record, pp. 449, 450) the Oregon Railway & Navigation Company and the Oregon Short Line & Utah Northern Railway Company filed exceptions, on the same ground as the exceptions filed in the original supplemental answer. These exceptions afterwards came on for hearing, and were sustained (Record, p. 451).

Without any other or additional pleadings being filed, or any independent libel being filed, a warrant of arrest against the Ocklahama (Record, p. 448) was issued,

and the Ocklahama was taken into custody by the marshal, and notice of such seizure was published in a newspaper in Portland, Oregon (Record, pp. 445, 447).

On the 30th day of July, 1896, and after the seizure of the Ocklahama, the Oregon Railway & Navigation Company (Record, p. 454) filed a motion for an order directing the marshal of the court to return the Ocklahama to the possession of Edwin McNeill, receiver of the Oregon Railway & Navigation Company. Said motion was based on the following grounds: First, that no warrant of arrest of the said Ocklahama was ever lawfully issued, and that no libel was filed in the clerk's office against the steamer Ocklahama; and, second, that the court was without jurisdiction to seize the Ocklahama in this proceeding, and was without power or authority in this cause to issue process against the Ocklahama, or to cause the Ocklahama to be seized.

On the 30th day of July, 1896, Edwin McNeill, receiver of the Oregon Railway & Navigation Company (Record, p. 455), filed his petition, wherein it was alleged that, on or about June 1, 1885, the Oregon Railway & Navigation Company made, executed and delivered to the Farmers' Loan & Trust Company a deed of trust of all the property of the Oregon Railway & Navigation Company, to secure an issue of bonds made by the Oregon Railway & Navigation Company, and that, at all times since June 1, 1886, there have been outstanding and in the hands of various persons over $12,000,000.00 of said bonds so secured by said mortgage; that default had been made in the payment of the interest upon said bonds, and, in accordance with the provisions of said mortgage, the principal of said mortgage had been declared to be due; and that, on

the 25th day of June, 1894, the Farmers' Loan & Trust Company, as trustee, had commenced a suit in the Circuit Court of the United States for the District of Oregon against the Oregon Railway & Navigation Company and others, for the purpose of foreclosing said mortgage; and that in said suit the said McNeill had been appointed receiver of the property of the Oregon Railway & Navigation Company; that, among other property owned by the Oregon Railway & Navigation Company, at the time of the execution of said deed of trust, was the steamer Ocklahama; that the home port of the said Ocklahama was the port of Portland, Oregon, and that the said Ocklahama, at the time of making said deed of trust, was enrolled or registered at the office of the collector of customs for the port of Portland, Oregon; and that the said deed of trust made to the Farmers' Loan & Trust Company was recorded in the office of the collector of customs at Portland, Oregon. That prior to the filing of the petition, the marshal of the court had entered upon the said Ocklahama, and had taken possession of the same, and had represented that the said boat was so taken into his possession as the result of process issuing out of the district court in this proceeding. The petition of the said McNeill then represented that no libel against the steamer Ocklahama had ever been filed in the clerk's office; that no warrant of arrest had ever been issued in this proceeding, calling upon the owners or persons claiming the said Ocklahama to answer any libel filed in this or any other suit, and thereupon prayed the court to direct the marshal to return the said Ocklahama to the possession of the said McNeill.

Balfour, Guthrie & Co. filed exceptions to the peti-

tion of McNeill on the ground that the said petition was immaterial, irrelevant and impertinent, and prayed that the petition be denied (Record, p. 457). The matter came on for a hearing, and, after argument, the court denied the motion of the Oregon Railway & Navigation Company and of McNeill as receiver, and refused to order the return of the Ocklahama to McNeill.

On the 25th day of September, 1896, there was filed a petition of the Oregon Railroad & Navigation Company (Record, p. 458). This petition recites that, on the 1st day of June, 1885, the Oregon Railway & Navigation Company did make, execute and deliver to the Farmers' Loan & Trust Company a mortgage bearing date the 1st day of June, 1885, whereby the said Oregon Railway & Navigation Company did mortgage to the Farmers' Loan & Trust Company all of its property, including the steamer Ocklahama, to secure a certain series of mortgage bonds; that, under and in pursuance of said mortgage, there were issued, and at the date of the decree afterwards mentioned, outstanding consolidated mortgage bonds to the amount of $12,583,000.00; that, on or about the 1st day of December, 1893, the Oregon Railway & Navigation Company did make default in the payment of the interest upon said bonds, and that such proceedings were afterwards had under said mortgage; that the principal of all of said bonds secured by said mortgage became due and payable; that after such default, and after the principal of said mortgage bonds became due, there was, on the 25th day of June, 1894, begun in the Circuit Court of the United States for the District of Oregon a suit in equity to foreclose said mortgage, in which suit the Farmers' Loan & Trust Company was complainant, and the Ore-

gon Railway & Navigation Company and others were defendants, and thereafter, in said suit, Edwin McNeill was appointed receiver of all of the property of the Oregon Railway & Navigation Company, including the steamboat Ocklahama, and duly qualified as such receiver and entered into the possession of all the property of the Oregon Railway & Navigation Company, including the Ocklahama, and remained in the possession of said property and said steamer until said steamer was taken from the custody of said McNeill by the marshal. That in said suit, so commenced to foreclose said mortgage, such proceedings were thereafter duly had on the 10th day of August, 1895, a decree was duly entered in said court, whereby it was ordered that, in default of certain payments therein mentioned, all of the property of the Oregon Railway & Navigation Company, including the said steamer Ocklahama, should be sold as an entirety, and that, afterwards and on the 9th day of July, 1896, all of said property was sold at public auction to A. Marcus, Charles S. Fairchild and C. Beaman for the sum of $0,437,250.00, and that, on the 16th day of July, said sale was confirmed and deeds were executed to the said Marcus and others; that, afterwards and on the 17th day of August, said Marcus, Fairfield and Beaman conveyed to the Oregon Railroad & Navigation Company all of the property purchased by the said Marcus, Fairchild and Beaman, including the said steamer Ocklahama, and that the Oregon Railway & Navigation Company, in pursuance of said decree, did, on the said 17th day of August, 1896, make, execute and deliver to the Oregon Railroad & Navigation Company a due and proper bill of sale of the said steamer Ocklahama; that no person had ever claimed

the said steamer Ocklahama as owner, and that the petitioner had no previous opportunity to appear and claim said steamer. Whereupon, the petitioner prayed that the Oregon Railroad & Navigation Company might be allowed to intervene for the purpose of protecting its interest in the said steamer, and might be allowed to claim said steamer as owner, and to appear herein and defend as such owner, and that the said steamer Ocklahama be appraised, in order that the petitioner might give bond for such appraised value and obtain a release of said steamer. On September 25 (Record, p. 462) the petition of the Oregon Railroad & Navigation Company came on for hearing, and, after argument, the court ordered that the Oregon Railroad & Navigation Company be allowed to intervene in the proceeding for the purpose of protecting its interest in the Ocklahama, and be allowed to claim the said steamer as owner, and to appear therein and defend as such owner, and that appraisers be appointed to determine the value of the said Ocklahama.

On the 30th day of September, 1896, the Oregon Railroad & Navigation Company filed its claim as owner (Record, p. 462), and gave its stipulation for costs (Record, p. 463).

On October 1, 1897 (Record, p. 464), the Oregon Railroad & Navigation Company filed its petition, alleging that it was entitled to the possession of the Ocklahama; that no warrant of arrest of the Ocklahama was ever lawfully issued, and no libel filed in the clerk's office against the Ocklahama; that the court was without jurisdiction to arrest the Ocklahama in said proceeding; that said proceeding was a suit *in personam;* and that to seize or undertake to seize the Ocklahama

in said proceeding was an attempt to change a proceeding *in personam* arising out of a collision in a proceeding *in rem*, contrary to the admiralty rules and practice of this court, and praying that the Ocklahama might be returned to the said Oregon Railroad & Navigation Company.

On the 22d day of October, the Ocklahama in the meantime having been appraised, the Oregon Railroad & Navigation Company gave its bond for the appraised value of the Ocklahama (Record, p. 467), and the court thereupon made an order directing the marshal to release the vessel and return the same to the possession of the claimant, the Oregon Railroad & Navigation Company (Record, p. 468).

Having been allowed to defend as the claimant and owner of the steamer Ocklahama, the Oregon Railroad & Navigation Company found on file in the court no libel against the steamer Ocklahama, and no pleadings and no libel or pleadings of any kind whatsoever requiring an answer, save the answers of Balfour, Guthrie & Co., Anna C. Larsen, Malvina Short, as administratrix, and Sven Anderson, as administrator, to the petition to limit liability, filed by the Oregon Railway & Navigation Company and the Oregon Short Line & Utah Northern Railway Company, when said proceeding was commenced. The Oregon Railroad & Navigation Company, therefore, on the 28th day of July, 1897, filed its answers to the answer of Balfour, Guthrie & Co. (Record, p. 475); to the answer of Malvina Short (Record, p. 481); to the answer of Sven Anderson (Record, p. 488), and to the answer of Anna C. Larsen (Record, p. 495). The first six articles in each of these answers are the same, and by these articles is alleged the incorporation

of the Oregon Railway & Navigation Company; the making of the mortgage to the Farmers' Loan & Trust Company on the 1st day of June, 1885, to secure the bonds issued by the Oregon Railway & Navigation Company; the recording of said mortgage in the office of the collector of customs of the port of Portland, the port of registry of the said steamer Ocklahama; the default in the payment of interest due on the said mortgage; the institution of the suit to foreclose said mortgage; the appointment of McNeill as receiver of the property; the decree of the court foreclosing said mortgage; the sale to Marcus, Fairchild and Beaman, and the making of deeds to such persons of all of the property of the Oregon Railway & Navigation Company, including the steamer Ocklahama; the sale by Marcus, Fairchild and Beaman to the Oregon Railroad & Navigation Company of all the property, and the bill of sale from the Oregon Railway & Navigation Company, to the Oregon Railroad & Navigation Company, made in pursuance of the decree of the court, of the steamer Ocklahama. Following these allegations in each of the answers and contained in the seventh and following articles in each of said answers, are denials of the facts alleged in the answers of Balfour, Guthrie & Co., Short, Anderson and Larsen, and allegations of the facts as to the cause of the accident to the Columbia.

This part of each of the answers alleges that the Oregon Short Line & Utah Northern Railway Company was in the possession of all of the property of the Oregon Railroad & Navigation Company, including the Ocklahama and the barge Columbia, and had sole and exclusive possession and management of said boats during the month of October, 1892, that, on the 19th

day of October, Balfour, Guthrie & Co. loaded upon the barge Columbia a cargo of wheat, to be transported by said barge from Portland, Oregon, to Astoria, Oregon; that said barge was under the charge of a captain, who had no connection with any other boat or vessel other than the Columbia, and that the captain of said barge, for and on behalf of the said Columbia, executed and delivered to said Balfour, Guthrie & Co. a shipping receipt for the wheat so loaded; that the said barge Columbia was, on the 19th day of October, 1892, taken in tow by some boat or vessel other than the Ocklahama, and was towed from the dock at which she had been loaded to a point or place in the city of Portland known as the boneyard, and there remained from the 19th day of October, 1892, until the afternoon of the 21st day of October, 1892; that, on the afternoon of the 21st day of October, 1892, the steamboat Ocklahama took said barge Columbia in tow for the purpose of towing the said barge Columbia from the boneyard in Portland to the dock of the Oregon Railway & Navigation Company, then operated by the Oregon Short Line & Utah Northern Railway Company, at Astoria, Oregon, at which said dock the said Ocklahama was to leave the said barge, and was not expected or intended to further tow said barge; that no contract was made with the said Ocklahama by the said Balfour, Guthrie & Co., for the towage of the said barge; that, on the arrival of the said Ocklahama with the said barge at the dock at Astoria, the said Ocklahama was under orders to return immediately to Portland, leaving the said barge along the said dock. The answers then allege the facts concerning the voyage to Astoria and the striking of the pontoon, and the taking

of the barge behind the dock, and the placing of the same in a safe position alongside of the dock, as found by the decree of the district court (Record, p. 84). The answers then allege that, after the said barge had rested against the dock for about an hour and a half, the master of the barge negligently caused the cargo on the deck of the barge to be shifted until the barge was on an even keel, and was no longer resting against this dock; that, by reason of such negligence, the barge was caused to list, and the loss of the wheat and the injury to Short and Peterson thereupon followed; that, while the barge remained against the dock, the cargo of the said barge might easily have been removed from the dock; that the steamer Ocklahama did not, in any way, cause the said injury; that the same was caused solely by reason of the negligence of the captain of the barge as aforesaid; that the injury to said wheat was caused solely by a peril over which the said Ocklahama and her officers and crew had no control, and that said injury could not have been prevented by the exercise of any care on the part of the said Ocklahama or her officers and crew; that it was not intended that the said Ocklahama should tow the said barge Columbia any further than to the said dock at Astoria, Oregon, and that said barge was to be delivered to the ship Westgate, by some other tug, and that no contract was ever made with the said steamer Ocklahama or her owners for the towage of the said barge Columbia to the said Westgate, and that the only contract existing for the towage of the said barge was that resulting by operation of law from the facts hereinbefore stated; that no libel had ever been filed in the cause against the said Ocklahama or her owners or charterers. The answers thereupon pray that the right, title and interest of the

Oregon Railroad & Navigation Company in and to the Ocklahama may be declared to be superior and prior to that of Balfour, Guthrie & Co., Short, Anderson and Larsen, and that the said Ocklahama may be restored to the possession of the said Oregon Railroad & Navigation Company, and that the Oregon Railroad & Navigation Company may have such other and further relief as may be just and equitable.

To these answers, Malvina Short (Record, p. 502), Sven Anderson (Record, p. 503) and Anna C. Larsen (Record, p. 504) filed exceptions. These exceptions are identical in form, and are the following:

First—That the court has no jurisdiction to allow the said answer of the Oregon Railroad & Navigation Company to be filed in this cause, or to entertain or to consider the same.

Second—That the Oregon Railroad & Navigation Company is not a proper party to this cause, and is not entitled to be heard.

Third—That the answer of the Oregon Railroad & Navigation Company does not state facts sufficient to constitute any cause of suit or ground of defense, or to entitle the Oregon Railroad & Navigation Company to any relief.

Balfour, Guthrie & Co. (Record, p. 504) filed their exceptions to the answer of the Oregon Railroad & Navigation Company, said exceptions being the following: "Except to the whole of the said answer, for that the same is impertinent; except to that portion of the answer which commences with the article or paragraph thereof designated number seven, and extends to conclusion of the said answer, for that the same is res judicata."

On August 2, 1897, a decree was entered by the district court sustaining the exceptions of Balfour, Guthrie & Co. and the other respondents to the answers of the Oregon Railroad & Navigation Company (Record, p. 505). On October 11, 1897, the Oregon Railroad & Navigation Company filed a petition (Record, p. 509) to set aside the decree, on the ground that no hearing was had and said decree was entered without notice. As the result of this petition, the decree of August 2, 1897, was set aside, and a rehearing was had (Record, p. 513).

On December 20, 1897, the exceptions to the answers of the Oregon Railroad & Navigation Company came on for hearing, and said exceptions were sustained, and thereupon the court ruled that the Oregon Railroad & Navigation Company would not be permitted to introduce evidence in support of its said several answers; and thereupon findings were made as to the damages suffered by Balfour, Guthrie & Co., Malvina Short as administratrix, Sven Anderson as administrator, and Anna C. Larsen; and it was found that Balfour, Guthrie & Co. had suffered damages in the sum of $16,018.79; that Malvina Short, as administratrix, has suffered damages in the sum of $5,000.00; that Sven Anderson, as administrator, had suffered damages in the sum of $3,000.00, and that Anna C. Larsen had not sustained any damage. And thereupon an order was made for the distribution of the appraised value of the Ocklahama, and the Oregon Railroad & Navigation Company was required to pay into the registry of the court for distribution the sum of $8,600.00, the appraised value of the said steamer; and further ordered that, when said sum was paid, the petition to limit liability of the Oregon Railway & Navigation Company and the Oregon Short

Line & Utah Northern Railway Company would be allowed (Record, p. 513).

From this decree the Oregon Railway & Navigation Company, the Oregon Sort Line & Utah Northern Railway Company and the Oregon Railroad & Navigation Company appealed to the Circuit Court of Appeals (Record, pp. 516-562).

The appeals so taken were heard by the Circuit Court of Appeals for the Ninth Circuit, and the decree of the district court was, in all respects, affirmed. The opinion of the circuit court of appeals will be found in the Record, p. 575.

The Oregon Railroad & Navigation Company, the Oregon Railway & Navigation Company and the Oregon Short Line & Utah Northern Railway Company, filed a petition for rehearing. On the 2d day of March, 1899 (Record, p. 593), said petition for rehearing was denied.

On the 6th day of March, 1899 (Record, p. 594), the Oregon Railroad & Navigation Company filed in the circuit court of appeals its petition for an appeal to this court, and, in connection with its appeal, with said petition, and on the same day (Record, p. 595), filed an assignment of errors. On the same day (Record, p. 601) the Oregon Railway & Navigation Company and the Oregon Short Line & Utah Northern Railway Company filed their petition for an appeal to this court, and in connection with said petition (Record, p. 603), filed their assignments of error. Gilbert, circuit judge, on the 4th day of April, 1899, duly allowed the said appeals, as shown by the orders appearing in the Record, pp. 608, 609.

In connection with its appeal, the Oregon Railroad

& Navigation Company made and now makes the following

ASSIGNMENT OF ERRORS.

First—The Circuit Court of Appeals erred in affirming the decree made and entered by the District Court of the United States for the District of Oregon on August 2, 1897, and re-entered on December 20, 1897.

Second—The Circuit Court of Appeals, in its decree made and entered upon the second appeal herein, erred in affirming the decree of the District Court of the United States for the District of Oregon, made and entered in said District Court on August 2, 1897, and re-entered in said District Court on the 20th day of December, 1897, for the reason that the said District Court had no jurisdiction under the mandate of the United States Circuit Court of Appeals entered in said District Court on March 16, 1896, to enter any decree imposing any liability upon this appellant or the steamer Ocklahama.

Third—The Circuit Court of Appeals, in its decree made and entered upon the second appeal herein, erred in affirming the decree of the District Court of the United States for the District of Oregon, made and entered in said District Court on August 2, 1897, and re-entered in said District Court on the 20th day of December, 1897, for the reason that the said District Court erred in seizing the steamer Ocklahama, and in making the decree appealed from, because the said District Court was without power or authority in this cause to issue process against the Ocklahama, or to cause the Ocklahama to be seized.

Fourth—The Circuit Court of Appeals, in its decree made and entered upon the second appeal herein, erred

in affirming the decree of the District Court of the United States for the District of Oregon made and entered in said District Court on August 2, 1897, and re-entered in said District Court on the 20th day of December, 1897, for the reason that the District Court erred in seizing the Ocklahama and in making said decree, because no libel in rem had, or ever has, been filed in this proceeding against the Ocklahama.

Fifth—The Circuit Court of Appeals, in its decree made and entered upon the second appeal herein, erred in affirming the decree of the District Court of the United States for the District of Oregon made and entered in said District Court on August 2, 1897, and re-entered in said District Court on the 20th day of December, 1897, because the District Court erred in seizing the Ocklahama, and in entering the decree so affirmed for the reason that this proceeding was commenced by The Oregon Railway & Navigation Company and The Oregon Short Line & Utah Northern Railway Company to limit their personal liability, and was a suit in personam, and the seizure of the said Ocklahama changed the said proceeding in personam arising out of a collision into a proceeding in rem, and said seizure in this proceeding and said decree so affirmed was contrary to the admiralty rules and practice of the Supreme Court of the United States.

Sixth—The Circuit Court of Appeals, in its decree made and entered upon the second appeal herein, erred in affirming the decree of the District Court of the United States for the District of Oregon made and entered in said District Court on August 2, 1897, and re-entered in said District Court on the 20th day of December, 1897, because the District Court erred in de-

creeing that the steamer Ocklahama, or her value, should be surrendered, for the reason that there is no evidence showing that the towage services of the steam tug Ocklahama were not fully performed when the said barge Columbia was placed alongside of the dock at Astoria, but, on the contrary, the evidence shows that said services of the said steam tug Ocklahama were, at the time of the alleged injuries to the respondents, and each of them, fully performed.

Seventh—The Circuit Court of Appeals, in its decree made and entered upon the second appeal herein, erred in affirming the decree of the District Court of the United States for the District of Oregon, made and entered in said District Court on the 2d of August, 1897, and re-entered in said District Court on the 20th day of December, 1897, because the District Court erred in decreeing that the steamer Ocklahama and the barge Columbia constituted one vessel within the meaning of the act of congress entitled "An act to limit the liability of ship owners and for other purposes, approved March 3, 1851," and the various statutes in addition thereto and amendatory thereof.

Eighth—The Circuit Court of Appeals, in its decree made and entered upon the second appeal herein, erred in affirming the decree of the District Court of the United States for the District of Oregon, made and entered in said District Court on August 2, 1897, and re-entered in said District Court on the 20th day of December, 1897, because the District Court erred in seizing the Ocklahama and in decreeing that the said Ocklahama, or her value, should be surrendered, for the reason that if The Oregon Railway & Navigation Company or the Oregon Short Line & Utah Northern

Railway Company, or both of them, were not entitled by reason of the filing of the petition initiating this proceeding and by reason of the payment into court of the appraised value of the Columbia and of the matters and things done by the said petitioners to limit their liability, then, and in that event, it was the duty of the District Court, under the rules and practice in such cases made and provided, to have dismissed this proceeding and have allowed the said Robert Balfour and others, and the said administratrix of the estate of Marshall B. Short, and the administrator of the estate of John August Peterson and Anna C. Larsen to have taken such remedy as they, or either of them, might have been advised against the Oregon Railway & Navigation Company or the Oregon Short Line & Utah Northern Railway Company, or both, or to have confined the relief granted to said respondents, or either of them, to personal decrees and judgments against the Oregon Railway & Navigation Company or the Oregon Short Line & Utah Northern Railway Company, or both, as the court might have been advised under the evidence and findings of fact, and the Circuit Court of Appeals by its decree should have so ordered.

Ninth—The Circuit Court of Appeals, in its decree made and entered upon the second appeal herein, erred in affirming the decree of the District Court of the United States for the District of Oregon made and entered in said District Court on August 2, 1897, and re-entered in said District Court on the 20th day of December, 1897, for the reason that the District Court erred in sustaining the exceptions of Robert Balfour and others to the answer of the Oregon Railroad & Navigation Company to the answer of the said Robert

Balfour and others, said answer of the Oregon Railroad & Navigation Company being filed July 28, 1897; and erred in refusing to allow the Oregon Railroad & Navigation Company to introduce evidence in support of its said answer, and in depriving the said the Oregon Railroad & Navigation Company, as the claimant of the steamer Ocklahama, of a trial upon the issues made by said answer.

Tenth—The Circuit Court of Appeals in its decree made and entered upon the second appeal herein, erred in affirming the decree of the District Court of the United States for the District of Oregon, made and entered in said District Court on August 2, 1897, and re-entered in said District Court on the 20th day of December, 1897, for the reason that the District Court erred in sustaining the exceptions of Anna C. Larsen, mother of John August Peterson, to the answer of the Oregon Railroad & Navigation Company to the answer of the said Anna C. Larsen, mother of John August Peterson, said answer of the Oregon Railroad & Navigation Company being filed July 28, 1897; and erred in refusing to allow the Oregon Railroad & Navigation Company to introduce evidence in support of its said answer, and in depriving the said the Oregon Railroad & Navigation Company, as the claimant of the steamer Ocklahama, of a trial upon the issues made by said answer.

Eleventh—The Circuit Court of Appeals, in its decree made and entered upon the second appeal herein, erred in affirming the decree of the District Court of the United States for the District of Oregon, made and entered in said District Court on August 2, 1897, and re-entered in said District Court on the 20th day of

December, 1897, for the reason that the District Court erred in sustaining the exceptions of Sven Anderson, administrator of the estate of John August Peterson, deceased, to the answer of the Oregon Railroad & Navigation Company to the answer of the said Sven Anderson, administrator of the estate of John August Peterson, deceased, said answer of the Oregon Railroad & Navigation Company being filed July 28, 1897, and erred in refusing to allow the Oregon Railroad & Navigation Company to introduce evidence in support of its said answer, and in depriving the said the Oregon Railroad & Navigation Company, as the claimant of the steamer Ocklahama, of a trial upon the issues made by said answer.

Twelfth—The Circuit Court of Appeals, in its decree made and entered upon the second appeal herein, erred in affirming the decree of the District Court of the United States for the District of Oregon, made and entered in said District Court on August 2, 1897, and re-entered in said District Court on the 20th day of December, 1897, for the reason that the District Court erred in sustaining the exceptions of Malvina Short, administratrix of the estate of Marshall B. Short, deceased, to the answer of the Oregon Railroad & Navigation Company to the answer of the said Malvina Short, administratrix of the estate of Marshall B. Short, deceased, said answer of the Oregon Railroad & Navigation Company being filed July 28, 1897; and erred in refusing to allow the Oregon Railroad & Navigation Company to introduce evidence in support of its said answer, and in depriving the said the Oregon Railroad & Navigation Company, as the claimant of the steamer Ocklahama, of a trial upon the issues made by said answer.

Thirteenth—The Circuit Court of Appeals, in its decree made and entered upon the second appeal herein, erred in affirming the decree of the District Court of the United States for the District of Oregon, made and entered in said District Court on August 2, 1897, and re-entered in said court on the 20th day of December, 1897, for the reason that the District Court erred in refusing to allow the Oregon Railroad & Navigation Company to introduce evidence in support of its several answers to the answer of Robert Balfour and others, and in depriving the Oregon Railroad & Navigation Company and the steamer Ocklahama of a trial upon the issues made by said answer and of its day in court.

Fourteenth—The Circuit Court of Appeals, in its decree made and entered upon the second appeal herein, erred in affirming the decree of the District Court of the United States for the District of Oregon, made and entered in said District Court on August 2, 1897, and re-entered in said District Court on the 20th day of December, 1897, for the reason that the District Court erred in refusing to allow the Oregon Railroad & Navigation Company to introduce evidence in support of its several answers to the answer of Sven Anderson, administrator of the estate of John August Peterson, deceased, and in depriving the Oregon Railroad & Navigation Company and the steamer Ocklahama of a trial upon the issues made by said answer and of its day in court.

Fifteenth—The Circuit Court of Appeals, in its decree made and entered upon the second appeal herein, erred in affirming the decree of the District Court of the United States for the District of Oregon, made and entered in said District Court on August 2, 1897, and re-entered in said District Court on the 20th day of

December, 1897, for the reason that the District Court erred in refusing to allow the Oregon Railroad & Navigation Company to introduce evidence in support of its several answers to the answer of Malvina Short, administratrix of the estate of Marshall B. Short, deceased, and in depriving the Oregon Railroad & Navigation Company and the steamer Ocklahama of a trial on the issues made by said answer and of its day in court.

Sixteenth—The Circuit Court of Appeals, in its decree made and entered upon the second appeal herein, erred in affirming the decree of the District Court of the United States for the District of Oregon, made and entered in said District Court on August 2, 1897, and re-entered in said District Court on the 20th day of December, 1897, for the reason that the District Court erred in decreeing that Robert Balfour and others had any interest in or lien upon the steamer Ocklahama as the result of any decree or proceedings had in this suit superior to the right, title, interest and estate of this appellant, arising by reason of the purchase of the said steamer by this appellant, as the result of the foreclosure of the mortgage made by the Oregon Railway & Navigation Company to the Farmers' Loan & Trust Company, and referred to in the answer of this appellant to the answer of Robert Balfour and others, such answer of appellant being filed July 28, 1897.

Seventeenth—The Circuit Court of Appeals, in its decree made and entered upon the second appeal herein, erred in affirming the decree of the District Court of the United States for the District of Oregon, made and entered in said District Court on August 2, 1897, and re-entered in said District Court on the 20th day of December, 1897, for the reason that the District Court

erred in decreeing that Sven Anderson, administrator of the estate of John August Peterson, deceased, had any interest in, or lien upon the steamer Ocklahama, as the result of any decree or proceedings had in this suit superior to the right, title, interest and estate of this appellant, arising by reason of the purchase of the said steamer by this appellant as the result of the foreclosure of the mortgage made by the Oregon Railway & Navigation Company to the Farmers' Loan & Trust Company, and referred to in the answer of this appellant to the answer of Sven Anderson, administrator of the estate of John August Peterson, deceased, such answer of appellant being filed July 28, 1897.

Eighteenth—The Circuit Court of Appeals in its decree made and entered upon the second appeal herein, erred in affirming the decree of the District Court of the United States for the District of Oregon, made and entered in said District Court on August 2, 1897, and re-entered in said District Court on the 20th day of December, 1897, for the reason that the District Court erred in decreeing that Malvina Short, administratrix of the estate of Marshall B. Short, deceased, had any interest in or lien upon the steamer Ocklahama as the result of any decree or proceedings had in this suit superior to the right, title, interest and estate of this appellant arising by reason of the purchase of the said steamer by this appellant, as the result of the foreclosure of the mortgage made by the Oregon Railway & Navigation Company to the Farmers' Loan & Trust Company, and referred to in the answer of this appellant to the answer of Malvina Short, administratrix of the estate of Marshall B. Short, deceased, such answer of the appellant being filed July 28, 1897.

Nineteenth—The Circuit Court of Appeals, in its decree made and entered upon the second appeal herein, erred in affirming the decree of the District Court of the United States for the District of Oregon, made and entered in said District Court on August 2, 1897, and re-entered in said District Court on the 20th day of December, 1897, for the reason that after the seizure of the Ocklahama there was no hearing before any court of any defense undertaken to be made by the said Ocklahama, or by this appellant.

Twentieth—The Circuit Court of Appeals, in its decree made and entered upon the second appeal herein, erred in holding that the proceedings had prior to the seizure of the Ocklahama constituted an adjudication against the Ocklahama, and all persons claiming any interest in the said Ocklahama.

Twenty-first—The Circuit Court of Appeals, in its decree made and entered upon the second appeal herein, erred in finding that as the result of the proceedings had in this suit, the respondents, Robert Balfour et al., Malvina Short, administratrix, and Sven Anderson, administrator, had any interest in or lien upon the steamer Ocklahama superior to the right, title, interest and estate of this appellant in the said vessel, acquired as the result of the foreclosure of the mortgage made by the Oregon Railway & Navigation Company to the Farmers' Loan & Trust Company, and referred to in the several answers of this appellant, filed in the District Court July 28, 1897.

## ARGUMENT.

For the convenience of the court, a detailed statement has been given herein of all the steps taken by the vari-

ous parties to this suit. For the purposes of the argument, the facts may be more shortly stated.

This proceeding was instituted by the Oregon Railway & Navigation Company as the owner of the Columbia, and by the Oregon Short Line & Utah Northern Railway Company as the lessee thereof, to limit their personal liability for injuries received by the respondents through a collision between the Columbia and the bottom of the Columbia river. No attempt was made by the petitioners to limit their liability for any injuries done by the Ocklahama. The Ocklahama was not surrendered, and her value was not paid into court. Had this been done, the entire litigation, so far as it affects the Ocklahama and the Oregon Railroad & Navigation Company, would have been avoided.

During the first trial in the District Court, the respondents made no attempt to seize the Ocklahama, or did not seek to have her brought into court. The principal contention made by all the respondents, as shown by their answers to the petition, was that the Columbia was old and rotten and was overloaded. The amounts sought to be recovered by the respondents were far in excess of the value of the Ocklahama; and therefore the respondents were not and could not have been satisfied by anything less than full personal liability on the part of the railway companies instituting the proceeding.

After the District Court held against the respondents on the question of the condition of the Columbia, the respondents contended that no limitation of liability could be had without a surrender of the Ocklahama also.

Upon this contention the District Court decided against the respondents on the ground that the Ockla-

hama and the Columbia were two vessels; that the contract of carriage had been made by the Columbia, and that the Ocklahama was without fault.

The Circuit Court of Appeals, upon the first appeal, held that the Columbia and the Ocklahama constituted one vessel; that the question as to which was at fault was immaterial, and that in order to obtain a limitation of liability, both vessels must be surrendered.

During the pendency of the appeal, receivers of the property of both of the petitioners had been appointed. When the mandate was entered in the District Court, the petitioners were no longer able to surrender the Ocklahama and thus limit their personal liability; and, being insolvent, the petitioners no longer cared about personal liability.

The position of the respondents also changed. They no longer sought personal liability, but wished to have the Ocklahama brought into court and be subjected without any further hearing to the demands of the respondents to the same extent as if the proceeding from the beginning had been one in rem against the Ocklahama.

Acting upon the suggestion of the respondents, the District Court, on receiving the mandate of the Circuit Court of Appeals, did not treat the proceeding as a personal proceeding, as one *in personam* between the original petitioners and the respondents, and did not enter judgment against the petitioners, but, on the contrary, that court caused a seizure to be made of the Ocklahama. E. McNeill, then receiver of the Oregon Railway & Navigation Company, appointed in a suit to foreclose a mortgage made in 1885 upon all of the property of the Oregon Railway & Navigation Com-

pany, filed his petition alleging his interest, and sought to have the vessel returned to him. (Record, p. 455.) This petition was denied. (Record, p. 458.) The Oregon Railroad & Navigation Company purchased the Ocklahama at the foreclosure sale under said mortgage, and after such purchase appeared and filed a petition setting up its interest in the Ocklahama, alleging that such interest was superior to the lien of any decree rendered in the suit, that no libel was ever filed in the clerk's office against the steamer Ocklahama, and that to seize, or undertake to seize, the Ocklahama in this proceeding was to attempt to change a proceeding *in personam*, arising out of a collision, to a proceeding *in rem*, contrary to the admiralty practice of this court, and praying that the Ocklahama be returned to the petitioner. (Record, p. 464.) Afterwards the Oregon Railroad & Navigation Company gave bond for the value of the Ocklahama and undertook to defend by filing answers to the only pleadings on file which would seem to require an answer, namely, the answers of the respondents to the petition to limit liability. The answers of the Oregon Railroad & Navigation Company (Record, pp. 475, 481, 488, 495) set up two main defenses:

First. That the Oregon Railroad & Navigation Company was the purchaser of the Ocklahama at a foreclosure sale had under a mortgage duly recorded and made in 1885, and therefore, standing in the shoes of the trustees of that mortgage, had a right in the Ocklahama superior to the lien of any judgment that could be rendered in any personal proceeding against the Oregon Railway & Navigation Company or the Oregon Short Line & Utah Northern Railway Company.

Second. That the alleged injuries were received after

the towage contract of the Ocklahama was performed, and without any negligence on the part of the Ocklahama; and that therefore the Ocklahama was not liable therefor.

Exceptions were filed to these answers by all of the respondents on the ground that both defenses were immaterial and impertinent; and that, second, the defense was *res judicata*. (See exceptions of Balfour, Guthrie & Co., Record, p. 473.) These exceptions were sustained, and the Oregon Railroad & Navigation Company was not allowed to defend. A decree was thereupon entered requiring the Oregon Railroad & Navigation Company to pay into court the appraised value of the Ocklahama, and this decree was affirmed by the Circuit Court of Appeals.

The reasons for sustaining the decree of the District court stated in the opinion of the Circuit Court of Appeals are extremely inconsistent and show clearly that it is impossible to sustain that decree. It is stated in that opinion (Record, p. 578): "The proceeding, therefore, is a suit in equity in admiralty, not to subject property to liens," etc. Yet it is held in effect that the proceedings had prior to the seizure of the Ocklahama established a maritime lien against her, and that her owner could not be heard after seizure for the purpose of denying the existence of such lien. It is further stated in the opinion (Record, p. 579): "Petitioners have become insolvent. Their assets have been sold upon foreclosure of mortgages. They have nothing now wherewith to meet the demands arising out of the accident." Because of the above facts it was regarded as equitable that the Ocklahama, sold upon such mortgage foreclosure, should be taken away from her then owner and sub-

jected to the demands arising out of the collision without giving her owner any opportunity to defend. The fact that the petitioners had nothing which was subject to the demands of the respondents is apparently assigned as the reason why the court should take possession of the Ocklahama, then belonging to this appellant, and make her subject to such demands. The equities of the case appealed so strongly to the Court of Appeals that the court stated (Record, p. 579) that the procedure whereby such result was obtained was wholly immaterial. The respondents could not be satisfied without the Ocklahama, and therefore the court must take the vessel, irrespective of right or procedure. On page 580 of the opinion it is said: "When the Oregon Railroad & Navigation Company appeared in the District Court in the proceedings subsequent to the mandate from this court, it attempted to litigate a matter which was already adjudicated, to which its predecessor in interest had been a party, and by which it, as successors, was bound."

When was there prior adjudication? The Circuit Court of Appeals clearly held that such prior adjudication took place before the seizure of the Ocklahama, and it certainly, after the seizure, expressly refused to further hear the matter. In effect the decree of the Circuit Court of Appeals, made upon the first appeal, was regarded as being equivalent to a decree *in rem* against the Ocklahama. The appellant insists—

First. That the title of the Oregon Railroad & Navigation Company to the Ocklahama could only be divested by a decree *in rem* and that such title is superior to any decree which could be rendered in the personal proceeding.

Second. That no valid decree *in rem* could be ren-

dered in the present proceeding for the following reasons:

(a) The suit was one to limit the personal liability. No amendment thereto was ever made, and it should therefore terminate in a decree *in personam* affecting only the title of the parties thereto.

(b) No libel was ever filed against the Ocklahama, and after her attempted seizure this appellant was not allowed to defend.

(c) The suit was for damages by a collision and was commenced *in personam*, and no amendment could be made changing it into an action *in rem*.

Third. No lien in favor of the respondents exists against the Ocklahama; and the facts alleged in the answers constituted a good defense.

To treat the decree of the Circuit Court of Appeals upon the first appeal as authorizing or requiring the entry without further hearing of a judgment *in rem* against the Ocklahama is to overlook every distinction between actions *in personam* and actions *in rem*, and is to ignore many familiar and well-settled principles applicable to proceedings *in rem*. These principles are so well settled that we feel justified in calling them to the attention of this court only because the Circuit Court of Appeals absolutely ignored them.

I.

**The title of The Oregon Railroad & Navigation Company to the Ocklahama could only be divested by a decree *in rem* and that such title is superior to any decree which could be rendered in the personal proceeding.**

A person injured by a maritime tort or by the violation of a maritime contract may, and usually does, have the following three remedies open to him:

First. An action at law for damages.

Second. An action *in personam* in admiralty against the wrongdoer.

Third. An action *in rem* against the vessel whose agents commit the tort or violate the contract.

The distinction between actions in rem and actions *in personam* is sharp and well defined. In an action *in rem* the remedy is limited to the vessel or to the stipulation as a substitute for it, and every person interested in the vessel is bound by the judgment. In an action *in personam* the judgment recovered is a personal judgment against the defendants, and the only persons bound by the proceedings are those who are parties thereto.

In Benedict's Admiralty, 3d Edition, Section 359, the distinction is stated in the following language: "Suits *in rem* are against the thing itself, and the relief sought is confined to the thing itself, and does not extend to any person. Suits *in personam*, on the other hand, are against the person, and the relief is sought against him, without reference to any specific property or thing. In a suit *in rem*, unless some one intervenes and assumes the responsibilities of the controversy, the power and process of the court is confined to the thing itself, and does not reach either the person or the other property of its owner. In a suit *in personam* the court is confined to the right and liabilities of the person; and, in its execution, proceeds against his property generally, without any regard to its relation to the matter in controversy."

In Sabine, 101 U. S. 388, Mr. Justice Clifford, speak-

ing for the court, says: "Actions *in rem* are prosecuted to enforce a right to things arrested to perfect a maritime privilege or lien attaching to a vessel or cargo, or both, and in which the thing to be made responsible is proceeded against as the real party, but actions *in personam* are those in which an individual is charged personally in respect to some matter of admiralty and maritime jurisdiction. Both the process and proceedings are different, and the appropriate decree in the one might be absolutely absurd in the other."

A judgment *in personam* in admiralty is of no higher character than a judgment at law or a decree in equity, and is subject to the same manner and the same priority. To hold that a judgment *in personam* has the same priority as a judgment which might be rendered *in rem* in the same cause of action is simply to disregard every distinction between actions *in personam* and actions *in rem*. A person having a cause of action in admiralty upon which he might sue either *in rem* or *in personam* cannot proceed *in personam* to establish his cause of action and then claim that the personal judgment so obtained would take rank against the offending boat in the same order as a maritime lien arising as the result of the offense committed; but in order to obtain the priority given to him by his maritime lien he must proceed *in rem* and defeat not only the owner but all lienors who may appear and defend. To give to a decree in personam against the owner the effect to any extent whatsoever of a decree in rem against the vessel would cause all suits in admiralty to be commenced *in personam* in the hope that a possibly insolvent owner would not interpose defenses which would undoubtedly be made by his creditors if the vessel were seized. The right of

junior lienors to defend upon the merits cannot be defeated by any such procedure.

In this country a maritime lien can be executed and divested only by a proceeding against the thing itself instituted in an admiralty court of the United States. Upon this subject Mr. Justice Grier, in Vandewater v. Mills, 19 How. 89, says:

"The maritime 'privilege' or lien is adopted from the civil law and imports a tacit hypothecation of the subject of it. It is a '*jus in re*,' without actual possession or any right of possession. It accompanies the property into the hands of a bona fide purchaser. It can be executed and divested only by a proceeding in rem. This sort of proceeding against personal property is unknown to the common law and is peculiar to the process of courts of admiralty."

A maritime lien, as stated by Mr. Justice Story in the Nestor, is: "The right of priority of satisfaction out of the proceeds of the thing in a concurrence of creditors." A "concurrence of creditors" can take place only as a result of seizure in a proceeding to enforce a lien, thus giving notice to all the world of the proceedings. It follows, therefore, that there can be no jurisdiction in rem without seizure.

The Alliance, 70 Fed. Rep. 273.

The Brig Ann, 9 Cranch, 289.

There can be no "concurrence of creditors" without a hearing in which each creditor is allowed to assert his lien on the fund and attempt to defeat the lien of others. As a result no valid judgment in rem can be rendered without a hearing.

Windsor v. McVeigh, 93 U. S. 274.

As a result of the purchase of the Ocklahama at the

foreclosure sale alleged in the answers of the Oregon Railroad & Navigation Company, that company succeeded not simply to the interest of the Oregon Railway & Navigation Company at the time of the sale, but also to the interest of the Farmers' Loan & Trust Company, acquired as a result of the making of the mortgage.

Jones on Mortgages, 3d Edition, Sec. 1653.

Pomeroy on Jurisprudence, Sec. 1228.

The law is thus stated by the section cited, in Jones on Mortgages:

"Title acquired by foreclosure relates back to the date of the mortgage so as to cut off intervening equities and rights. If all subsequent purchasers and incumbrancers are made parties to the bill, the title under the mortgage foreclosed is perfected to an absolute one. In such case the purchaser acquires the title of the mortgagee, and also the title of the mortgagor, as it stood at the time of the making of the mortgage."

It is not claimed by the Oregon Railroad & Navigation Company, as stated in the opinion of the Circuit Court of Appeals (Record, p. 579), that such company was an innocent purchaser without notice of the possibilities of any maritime lien being asserted against the Ocklahama, but it is claimed that the Oregon Railroad & Navigation Company stepped into the shoes of the Farmers' Loan & Trust Company, and is entitled to the same rights that the Farmers' Loan & Trust Company had, and that the title of the Oregon Railroad & Navigation Company could be divested only by the same procedure as would have been necessary to have cut off the lien of the Farmers' Loan & Trust Company upon the Ocklahama, acquired as the result of the making of

the mortgage of June 1, 1885, namely, by a suit in rem against the Ocklahama.

The mortgage of the Ocklahama to the Farmers' Loan & Trust Company, made on June 1, 1885, is on familiar principles, repeatedly stated by the Circuit Court of Appeals for the Ninth Circuit, superior to any personal judgment against the Oregon Railway & Navigation Company arising out of any contract made or tort committed by that company after June 1, 1885.

The Farmers' Loan & Trust Company v. Northern Pacific Railroad Co., 79 Fed. Rep. 227.

The Northern Pacific Railroad Co. v. Heflin, 83 Fed. Rep. 93.

Farmers' Loan & Trust Co. v. Longworth, 83 Fed. Rep. 336.

Farmers' Loan & Trust Co. v. Nestelle, 79 Fed. Rep. 748.

The superiority of the lien of the mortgage of the Farmers' Loan & Trust Company to personal judgments against the Oregon Railway & Navigation Company would be valueless unless, as the result of the sale under foreclosure, the purchaser took a title superior to the lien of such judgments against the Oregon Railway & Navigation Company. And such is the rule of law stated by the authorities cited. The Oregon Railroad & Navigation Company therefore acquired the Ocklahama as the result of the foreclosure sale, free and clear from the lien of any personal judgments or adjudications which had been rendered against the Oregon Railway & Navigation Company from June 1, 1885, to the date of the foreclosure sale.

The Oregon Railroad & Navigation Company, purchasing the Ocklahama at a sale under such mortgage,

necessarily took the Ocklahama subject to all maritime liens against the vessel then existing and which should be asserted within a reasonable and proper time after the foreclosure sale. The position taken by the Oregon Railroad & Navigation Company, however, is that no matter how many causes of action might exist against the Oregon Railway & Navigation Company giving rise to maritime liens against the Ocklahama, the title of the Farmers' Loan & Trust Company in the Ocklahama and of the Oregon Railroad & Navigation Company, as its successor, could not be divested as the result of the prosecution of any such cause of action against the Oregon Railway & Navigation Company, but could only be divested by a decree rendered in a proceeding ***in rem*** against the Ocklahama after seizure and a hearing had as a result of such seizure, and that no decree rendered in a personal action against the Oregon Railway & Navigation Company, although finding facts out of which a maritime lien might arise, could in any way divest the interest of the Farmers' Loan & Trust Company in the Ocklahama. In this country a maritime lien can be executed and divested only by a proceeding ***in rem*** instituted in an admiralty court of the United States.

Vandewater v. Mills, 19 How. 89.

Courts of law, courts of equity and courts of admiralty in actions ***in personam*** cannot execute maritime liens as a result of finding facts in such personal actions which, if found in an action in admiralty, would give rise to a lien. The facts found in such personal action do not bind the thing itself and cannot affect the rights in the thing of any persons other than those who are parties to such personal proceeding.

In the present case, neither the Farmers' Loan & Trust Company nor its successor, the Oregon Railroad & Navigation Company, was a party to the proceeding at any time prior to the seizure of the Ocklahama, and could not be bound by any fact found in such personal proceedings. As a result of the institution of the proceeding to limit liability, the Ocklahama was not brought into court in any sense whatsoever, either by the surrender of the vessel to a trustee or by the giving of a bond. Even had the Ocklahama been surrendered to a trustee, the Farmers' Loan & Trust Company would not have been compelled to take notice of the proceedings, for the reason that the notice given in such proceedings is to the persons claiming losses, and the surrender to a trustee would not have divested the lien of the mortgage to the Farmers' Loan & Trust Company. Upon this subject Mr. Benedict in his work on Admiralty, 3d Edition, Sec. 573, says:

"But when the owner transfers to a trustee, the case is different. Such a conveyance could hardly be held to have the effect of a sale under the decree of an admiralty court, as to freeing her from prior liens. And it is to be noticed that the provision in the Supreme Court Rules for giving notice is for citing 'all persons claiming damages for any such embezzlement, loss, destruction, damage or injury,' which would not include prior mortgagees or prior lien holders, whose existence even might be unknown. But, as I have already said, if any such prior lien were known, and its enforcement or existence might interfere with the obtaining for the creditors in the limitation of liability proceeding, of the whole value of the res, it would be in the power of the court to remedy this difficulty."

As to the manner of remedying the difficulty suggested, the attention of the court is called to the preceding section, wherein it is stated that in case the lien of the mortgage was not satisfied, the court could refuse the limitation of liability. The text of Mr. Benedict is supported by reason and common sense. The lien of a mortgage upon a vessel could not be divested or impaired to any extent whatsoever by any transfer made to a trustee by the mortgagor for the purpose of limiting the personal liability of the mortgagor. Such a transfer could not affect the mortgage to any greater extent than would a mere deed of gift made by the mortgagor based upon the consideration of love and affection. The mortgagee is not bound to take any notice of such transfers, and is not bound to take notice of any personal litigation arising between the mortgagor and any person whomsoever, and is not bound to any extent whatsoever as the result of any such suit. The only things which the mortgagor is bound to notice are seizures made by the marshals of the District Courts of the United States in proceedings in rem to enforce maritime liens; and when such seizure is made, and not until then, is the mortgagee bound to pay any attention to the supposed existence of any maritime lien.

In order to obtain a limitation of liability, it may have been the duty of the Oregon Railway & Navigation Company to surrender the Ocklahama to a trustee or to give a bond for her appraised value. If a bond for such appraised value had been given, it would have been the personal bond of the Oregon Railway & Navigation Company, and would not have discharged or affected the lien of the mortgage made to the Farmers' Loan & Trust Company. If the Oregon Railway & Navigation

Company had sought to surrender the Ocklahama to a trustee for the purpose of limiting its personal liability, the Oregon Railway & Navigation Company would have been required, before obtaining such limitation, to have obtained a release of the mortgage of the Farmers' Loan & Trust Company upon the Ocklahama, and, failing to obtain such release, would not have been entitled to the limitation of liability.

Benedict's Admiralty, 3d Edition, Sec. 574.

Neither the giving of the bond nor the surrender to the trustee, ***both voluntary acts of the Oregon Railway & Navigation Company itself for the purpose of limiting its own personal liability***, could defeat the lien of the mortgage of the Farmers' Loan & Trust Company. Any such result would enable the owner of a vessel to discharge a mortgage without payment, as the result of instituting a suit purely for the personal benefit of such owner.

Assume that after the loss of the wheat of Balfour, Guthrie & Co., by reason of the destruction of the barge Columbia, duly authorized officers of the Oregon Railway & Navigation Company and representatives of Balfour, Guthrie & Co. had met and entered into the most solemn stipulation possible to the effect that the Ocklahama was subject to a maritime lien in favor of Balfour, Guthrie & Co., and exceeding the value of the vessel, and that then the officers of the Oregon Railway & Navigation Company had executed a deed to Balfour, Guthrie & Co. for the Ocklahama in satisfaction of such lien. Would not such conveyance be inferior to the mortgage of the Farmers' Loan & Trust Company? Suppose that such officers and representatives of the parties had failed to agree and had submitted the matter to arbi-

tration, and it had been found as a result of such arbitration that the Ocklahama was subject to a lien, and that then the Oregon Railway & Navigation Company had made a conveyance to Balfour, Guthrie & Co. Would not such conveyance be subject to the mortgage made to the Farmers' Loan & Trust Company? Assume that instead of submitting the matter to arbitration the matter was presented to a court of competent jurisdiction, either in law or in equity. In a proceeding between Balfour, Guthrie & Co. and the Oregon Railway & Navigation Company, could such court render any decree finding facts showing the existence of a maritime lien which would divest the title of the Farmers' Loan & Trust Company, or which would render any conveyance of the Ocklahama by the Oregon Railway & Navigation Company to Balfour, Guthrie & Co. superior to the lien of the mortgage of the Farmers' Loan & Trust Company? Assume that in the present case the Oregon Railway & Navigation Company, instead of contesting the liability of the Ocklahama, had in the petition instituting this proceeding conceded such liability and expressly alleged that the Ocklahama was subject to a maritime lien in favor of Balfour, Guthrie & Co., and that upon such allegations the District Court had found in favor of the existence of such lien, and had held that the Oregon Railway & Navigation Company could not limit its liability without surrendering the Ocklahama. Would such action on the part of the Oregon Railway & Navigation Company in a personal proceeding voluntarily instituted by itself and for its own benefit, in order to limit its personal liability, divest and discharge the lien of the mortgage of the Farmers' Loan & Trust Company, or would it not have been necessary for Balfour,

Guthrie & Co., in order to divest the lien of the mortgage, to have instituted a suit *in rem* and to have thus given the Farmers' Loan & Trust Company an opportunity to contend that as a matter of fact no maritime lien existed against the Ocklahama?

In other words, could the Oregon Railway & Navigation Company, by any action on its part, although aided by the decree of a court having jurisdiction only of parties and not jurisdiction *in rem* over the Ocklahama, have divested the lien of the mortgage of the Farmers' Loan & Trust Company in favor of any maritime lien of Balfour, Guthrie & Co. against the Ocklahama? It would seem that there could be but one answer to these questions, namely, that no matter how well satisfied the Oregon Railway & Navigation Company might be as to the existence of a maritime lien against the Ocklahama in favor of Balfour, Guthrie & Co., and no matter how many times a court having jurisdiction only of the parties should find in favor of such maritime lien, the lien of the mortgage made to the Farmers' Loan & Trust Company could only be divested as the result of a proceeding *in rem* in the District Court of the United States after seizure of the Ocklahama and opportunity on the part of the Farmers' Loan & Trust Company to be heard against the lien.

A maritime lien, as stated by Mr. Justice Story in The Nestor, 2 Summer, 83, is "a right of priority of satisfaction out of the proceeds of the thing in a concurrence of creditors." "The concurrence of creditors" can only take place as the result of seizure in a proceeding to enforce the lien, and the consequent notice to all the world of the proceeding. It therefore follows that there can be no jurisdiction *in rem* without seizure.

The Alliance, 70 Fed. Rep. 273.

The Brig Anne, 9 Cranch, 290.

There can be no concurrence of creditors without a hearing in which each creditor is allowed to assert his own lien on the fund, and attempt to defeat the lien of others. As a result, no valid judgment *in rem* can be rendered without a hearing.

Windsor v. McVeigh, 93 U. S. 274.

In the present case all of the proceedings were purely personal proceedings between the Oregon Railway & Navigation Company and the Oregon Short Line & Utah Northern Railway Company, on the one side, and the appellees on the other, and could result in nothing other than adjudications which would simply bind the parties thereto. To these proceedings the Farmers' Loan & Trust Company was not a party and was not bound thereby. No privity within the meaning of the law relating to estoppel existed between the Farmers' Loan & Trust Company and the Oregon Railway & Navigation Company.

Privity is the mutual and successive relationship to the same rights of property. In order to create this relationship, two requisites must exist. In the first place, the person who is to be thus connected with the judgment must be one who claims an interest in the subject affected through or under one of the parties. In the second place, privies, in such sense as they are bound by the judgment, are those who acquire the interest in the subject-matter ***after*** the rendition of the judgment. If their title or interest attached before that fact, they are not bound unless made parties.

Black on Judgments, Sec. 549.

In this proceeding the Ocklahama was not the subject-

matter of the controversy, and could not be affected in any way by any decision rendered herein. The Oregon Railroad & Navigation Company acquired its interest through the foreclosure of the mortgage made to the Farmers' Loan & Trust Company, and therefore stood in the place of the Farmers' Loan & Trust Company.

Jones on Mortgages, Sec. 1654.

The Farmers' Loan & Trust Company acquired its interest in the vessel by a mortgage in 1885, long prior to the commencement of this proceeding or the rendition of any decision herein. Both of the requisites necessary to create privity, as stated by Mr. Black, were therefore lacking.

II.

**No valid decree *in rem* was or could be rendered in the present proceeding.**

No valid decree *in rem* was or could be rendered in the proceeding for the following reasons:

(a) The suit was one to limit personal liability. No amendment thereto was ever made, and it should therefore terminate in a decree *in personam* affecting only the title of the parties thereto.

(b) No libel was ever filed against the Ocklahama, and after her attempted seizure this appellant was not allowed to defend.

(c) The suit was for damages by a collision and was commenced *in personam* and no amendment could be made changing it into an action *in rem*.

**The suit was one to limit personal liability. No amendment was ever made and it should therefore terminate in a decree *in personam* affecting only the title of the parties thereto.**

Congress has seen fit, by section 4283 of the Revised Statutes to limit in cases of torts committed without the knowledge or privity of the owner the total personal liability of the owner to the value of the vessel itself, and by the act of 1884 (23 Statutes at Large, p. 57) congress has limited the liability of each owner to the value of his individual interest in the vessel. In order to avail himself of the act to limit liability, the owner of a vessel may surrender her to a trustee, or such owner, as the Oregon Railway & Navigation Company and the Oregon Short Line & Utah Northern Railway Company did in the present proceeding, give a bond for the appraised value of the vessel. Is such a proceeding a personal proceeding between the owners and the claimants who may appear, or is it an action *in rem* against the vessel itself?

This question is plainly answered by the authorities to the effect that a proceeding to limit liability is not an action against the vessel in any sense whatsoever. When a vessel is surrendered to a proceeding, such surrender is purely a voluntary act on the part of the owner, and such an act does not and could not divest any prior liens.

Benedict's Admiralty, 3d Edition, Sec. 573.

The vessel does not pass into the hands of the trustee as a result of a seizure upon process issued out of any court of competent jurisdiction and therefore no notice is given to any lienor of such surrender. The giving of a bond for the appraised value of the vessel is purely a voluntary act of the owner and could give notice to no one interested in the vessel, and therefore no lien could arise against the vessel itself as the result of any proceedings subsequently had.

In an action against the vessel, the person commencing the action seizes the vessel subject to all prior maritime liens; but in a proceeding to limit liability, the owner must surrender the vessel free from liens or must give bond for the value of the vessel at the end of the voyage without deducting the amount of liens arising out of either prior or subsequent voyages.

Gokey v. Fort, 44 Fed. Rep. 364.

The U. S. Grant, 45 Fed. Rep. 642.

In re Morrison, 147 U. S. 34, this court has thus stated the nature of the proceeding:

"The proceeding to limit liability is not an action against the vessel and her freight except when they are surrendered to a trustee, but is an equitable action."

On the first appeal in this cause, the Circuit Court of Appeals (Record, p. 400) said:

"The barge Columbia, in respect of which the petitioners sought to limit their liability, not having been surrendered to a trustee, as provided for by section 4285 of the Revised Statutes, the proceeding taken was not a proceeding in rem, but a suit in equity. (In re Morrison, 147 U. S. 14-34, 13 Sup. Ct. 246.)"

If the proceeding was not a suit *in rem* against the Columbia whose value had been paid into court, it certainly was not a suit *in rem* against the Ocklahama, whose value had not been paid into court, and in respect to which the petitioners were not seeking any limitation of liability.

The district court had an undoubted right to enter a judgment *in rem* in a proper case, but it is a fundamental principle that no judgment can be rendered in any court not authorized by the rules and practice applicable to the particular case presented.

In order to render a valid judgment there must be jurisdiction to give the judgment rendered, as well as to hear and determine the cause.

U. S. v. Walker, 109 U. S. 267.
Ex parte Reed, 100 U. S. 23.
Hovey v. Elliott, 167 U. S. 414.
Windsor v. McVeigh, 93 U. S. 282.

In Windsor v. McVeigh, the court (p. 282) say:

"All courts, even the highest, are more or less limited in their jurisdiction; they are limited to particular classes of actions, such as civil or criminal; or to particular modes of administering relief, such as legal or equitable; or to transactions of a special character, such as arise on navigable waters, or relate to the testamentary disposition of estates; or to the use of particular process in the enforcement of their judgments. Norton v. Meador, Circuit Court of California. Though the court may possess jurisdiction of a cause, of the subject-matter, and of the parties, it is still limited in its modes of procedure, and in the extent and character of its judgments. It must act judicially in all things, and cannot then transcend the power conferred by law. If, for instance, the action be upon a money demand, the court, notwithstanding its complete jurisdiction over the subject and parties, has no power to pass judgment of imprisonment in the penitentiary upon the defendant. If the action be for the possession of real property, the court is powerless to admit in the case the probate of a will."

Under the above cases no judgment in rem could be entered in this personal proceeding.

**No libel was ever filed against the Oklahama; and after her seizure, the Oregon Railroad & Navigation Company was not allowed to defend.**

In order that a valid judgment *in rem* may be entered, the following steps must be taken, in the order named:

First—There must be a libel or information filed against the thing, stating the reasons why there should be a condemnation and forfeiture.

Second—The thing must be seized within the jurisdiction of the court.

Third—Notice must be given of the seizure according to the rules and practice of the court.

Fourth—There must be a full and complete hearing of all persons appearing and claiming interests in the thing.

Rules of Practice in Admiralty, Rule One.

The Alliance, 70 Fed. Rep. 273.

The Brig Anne, 9 Cranch, 290, 1.

Taylor v. Carroll, 20 How. 599.

The Rio Grande, 23 Wallace, 464.

Windsor v. McVeigh, 93 U. S. 274, 277.

Hovey v. Elliott, 164 U. S. 414.

The first admiralty rule provides as follows:

"No mesne process shall issue from the district courts in any civil cause of admiralty or maritime jurisdiction until the libel or libel of information shall be filed in the clerk's office from which such process is to issue."

In the present proceeding, no libel against the Ocklahama was filed. The answer of Balfour, Guthrie & Co. (Record, p. 20) prays that the respondents "be decreed to recover from the said libelants and petitioners the full amount of their damages in this behalf sustained." The answer of Malvina Short (Record, p. 32) prays "for a judgment against said libelants for the sum of $5,000 damages," and a similar prayer is found in the answer of Sven Anderson (Record, p. 37). Personal liability was the thing sought to be avoided on the part of the Ore-

gon Railway & Navigation Company and the Oregon Short Line & Utah Northern Railway Company when the petition was filed and this proceeding initiated; and personal liability on the part of the petitioners was the thing sought to be established at the time the answers of the various claimants were filed; and no libel or information seeking a judgment in rem was ever filed against the Ocklahama by any of the claimants.

In Ward et al. v. Cunningham et al., 21 How. 572, the parties had sought by stipulation to make the answer treated as a cross-libel in the cause. In condemning such procedure this court said:

" Regularity in pleading is both convenient and essen-
" tial in judicial investigations, and such departures from
" the usual practice as are exhibited in this record ought
" not to receive countenance."

Seizure of the res is the foundation of jurisdiction in rem. This principle is stated and applied by the Circuit Court of Appeals for the Ninth Circuit in The Alliance, 70 Fed. Rep. 273.

The same familiar principle is stated by this court in the Rio Grande, 23 Wallace, 458, 464, citing and referring to the Brig Anne, 9 Cranch, 290, and Taylor v. Carroll, 20 Howard, 599.

In the present case the Ocklahama was seized, but after seizure the Oregon Railroad & Navigation Company was not allowed to defend.

The jurisdiction acquired by seizure is the right to hear and determine; not to determine without hearing.

In Windsor v. McVeigh, 93 U. S. 278, this court said:

"The jurisdiction acquired by the court by seizure of the res was not to condemn the property without further proceedings. The physical seizure did not of itself estab-

lish the allegations of the libel, and could not, therefore, authorize the immediate forfeiture of the property seized. A sentence rendered simply from the fact of seizure would not be a judicial determination of the question of forfeiture, but a mere arbitrary edict of the judicial officer. The seizure in a suit in rem only brings the property seized within the custody of the court, and informs the owner of that fact. The theory of the law is that all property is in the possession of its owner, in person or by agent, and that its seizure will, therefore, operate to impart notice to him. Where notice is thus given, the owner has the right to appear and be heard respecting the charges for which the forfeiture is claimed. That right must be recognized and its exercise allowed before the court can proceed beyond the seizure to judgment. The jurisdiction acquired by the seizure is not to pass upon the question of forfeiture absolutely, but to pass upon that question after opportunity has been afforded to its owner and parties interested to appear and be heard upon the charges."

In the same case, on page 277, it is further said:

"That there must be notice to a party of some kind, actual or constructive, to a valid judgment affecting his right, is admitted. Until notice is given, the court has no jurisdiction in any case to proceed to judgment, whatever its authority may be, by the law of its organization, over the subject-matter. But notice is only for the purpose of affording the party an opportunity of being heard upon the claim or the charges made; it is a summons to him to appear and speak, if he has anything to say, why the judgment sought should not be rendered. A denial to a party of the benefit of a notice would be in effect to deny that he is entitled to notice at all, and the sham

and deceptive proceeding had better be omitted altogether. It would be like saying to a party, Appear, and you shall be heard; and, when he has appeared, saying, Your appearance shall not be recognized, and you shall not be heard. In the present case, the district court not only in effect said this, but immediately added a decree of condemnation, reciting that the default of all persons had been duly entered. It is difficult to speak of a decree thus rendered with moderation; it was in fact a mere arbitrary edict, clothed in the form of a judicial sentence."

After making the foregoing quotation from Windsor v. McVeigh, Mr. Justice White, in Hovey v. Elliott, 167 U. S., p. 415, says: "This language but expresses the most elementary conception of the judicial function."

The district court sustained the exceptions to the answer of the Oregon Railroad & Navigation Company on the ground that the proceedings had, prior to the mandate of the Circuit Court of Appeals, constituted an adjudication against the Ocklahama and all persons interested therein, and gave to that adjudication the effect of a judgment in rem to enforce a maritime lien.

To condemn the Ocklahama in this proceeding is to condemn without a libel, and thus violate the first admiralty rule of this court. To condemn the Ocklahama as the result of the proceedings had before seizure is to hear without jurisdiction. To condemn the Ocklahama as the result of the proceedings had after her seizure is to determine without a hearing.

Under the decisions of this court already cited, the decree in the present case could not stand, even if collaterally attacked.

**No amendment could change this suit into one *in rem* against the Ocklahama.**

The accident to the Columbia commenced by the striking of the pontoon lying in front of the dock, and the injuries suffered by the various claimants were received through the collapse of the barge, resulting from the collision between the barge and the bottom of the Columbia river. Any suit instituted in admiralty, either *in rem* or *in personam* to recover damages received through the accident, would be a suit "for damage by collision" within the meaning of the fifteenth admiralty rule.

In Corsair, 145 U. S. 335, Eliza Barton, as stated on page 336, was killed as the result of a collision between the tug Corsair, on which the said Eliza Barton was riding, and the right bank of the Mississippi river, and the proceedings instituted to recover damages for her death were treated as coming within the fifteenth admiralty rule. This rule, by its terms, and as interpreted by this court in the Corsair, prohibits the joinder in a suit for damage by collision of an action *in rem* and an action *in personam*. In the Corsair, according to the statement of facts, page 337, a libel in rem was filed against the Corsair, the vessel was arrested, and was released on a stipulation given by her owners, Samuel S. Brown and Harry Brown. Exceptions were filed to the libel on the ground that it set forth no cause of action cognizable by proceedings *in rem*. The exceptions were sustained; and the libelants were allowed to amend their pleadings and proceed *in personam;* and on the following day an amended libel was filed against the owners of the Corsair. Exceptions were filed to the amended libel on the ground that there was no power in the court to allow the libelants to change the suit from a suit *in rem* to a suit *in personam*. This court held that the exceptions were properly sustained, and the effect of rule 15 is stated, commencing on page 341 of the opinion.

The present proceeding at the outset was purely a personal proceeding between the parties interested therein, and it could not, under the decision of the Corsair, be changed by any amendment into a proceeding *in rem* against the Ocklahama. It follows, therefore, that even if all of the steps necessary to a judgment in rem, including seizure and hearing after seizure, had been taken, no decree *in rem* against the Ocklahama could be rendered in the present proceeding; but an independent proceeding must necessarily be commenced.

**The Oregon Railroad & Navigation Company is not estopped by any proceeding had prior to the seizure and was not allowed to defend after seizure.**

A judgment in rem, provided there has been seizure and notice of seizure, is binding upon all the world; but if there has simply been seizure, without notice thereof, the judgment binds only the parties who appear therein.

Bailey v. Sundburg, 49 Fed. Rep. 583, 585.

In the case just referred to, the owner of the vessel which sunk by collision with a steamer brought a libel in rem and the steamer was attached, but no notice was given or publication made, as required by admiralty rule 9. Subsequently the steamer was released on her owners giving bond to the libelant. It was held that a decree dismissing the libel was binding on the libelant only, and would not prevent a new libel by the owner of the cargo. This decision arises from the principle that, in addition to seizure, notice of the proceedings, by monition or publication in some form, must be given before any binding judgment in rem can be given. This principle is clearly stated by Mr. Justice Field in Windsor v. McVeigh, 93 U. S. 274, 279, as follows:

"The jurisdiction acquired by the seizure is not to pass upon the question of forfeiture absolutely, but to pass upon that question after opportunity has been afforded to its owner and parties interested to appear and be heard upon the charges. To this end some notification of the proceedings, beyond that arising from the seizure, prescribing the time within which the appearance must be made, is essential. Such notification is usually given by monition, public proclamation, or publication in some other form. The manner of the notification is immaterial, but the notification itself is indispensable."

In some instances, where suits in rem have been successfully prosecuted against a claimant who has appeared, the successful party has been allowed to recover in personam; but in all such cases the distinction between actions in rem and actions in personam has been carefully preserved and the libelant has been required to introduce proper allegations in personam and proceed upon them to a further decree against the person.

Benedict's Admiralty, Third Edition, Sec. 547.

The Zodiac, 5 Fed. Rep. 222.

Such action, however, cannot be taken in a suit for damage by collision, for the reason that an action *in rem* and an action *in personam* to recover damages for collision cannot, under the fifteenth admiralty rule, be joined in the same proceeding.

The Corsair, 145 U. S. 335.

Unless there be introduced in the proceeding *in rem* appropriate allegations as to the ownership of the vessels and the commission of the tort or the violation of the contract by some particular individual, the decision in the proceeding *in rem* cannot operate as an estoppel in a subsequent proceeding *in personam*.

The Jesse Williamson, Jr., 108 U. S. 305, 311.

In a proceeding *in rem* without seizure and notice of seizure, no judgment *in rem* can be rendered having any binding force whatever.

The Alliance, 70 Fed. Rep. 273.

Taylor v. Carroll, 20 Howard, 599.

Windsor v. McVeigh, 93 U. S. 274.

No judgment *in rem* having any binding force whatever can be rendered without a hearing.

Windsor v. McVeigh, 93 U. S. 274.

Hovey v. Elliott, 167 U. S. 414.

The foregoing authorities clearly dispose of the claim that the proceedings had in this cause prior to seizure amounted to an adjudication *in rem* against the Ocklahama or against this appellant. There was no libel filed against the Ocklahama; there was no seizure; there was no notice of seizure, and there was no hearing. Every essential, therefore, necessary to a valid judgment *in rem* was lacking.

If the proceedings prior to seizure be regarded, as indeed they must, as a proceeding *in personam* between the persons parties thereto, the decision rendered can operate as an estoppel only between the persons parties to the proceedings, their privies and successors in interest. Neither the Oregon Railroad & Navigation Company nor the Farmers' Loan & Trust Company were parties to the original proceedings. No privity existed between the Oregon Railroad & Navigation Company and the Oregon Railway & Navigation Company. Privity is the mutual and successive relationship to the same rights of property. In order to create this relationship, two requisites must exist. In the first place, the person who is to be thus connected with the judgment must be

one who claims an interest in the subject affected through or under one of the parties. In the second place, privies, in such sense as they are bound by the judgment, are those who acquire the interest in the subject-matter *after* the rendition of the judgment. If their title or interest attached before that fact, they are not bound unless made parties.

Black on Judgments, Sec. 549.

In this proceeding the Ocklahama was not the subject-matter of the controversy, and could not be affected in any way by any decision rendered herein. The Oregon Railroad & Navigation Company acquired its interest through the foreclosure of the mortgage made to the Farmers' Loan & Trust Company, and therefore stood in the place of the Farmers' Loan & Trust Company.

Jones on Mortgages, Sec. 1654.

The Farmers' Loan & Trust Company acquired its interest in the vessel by a mortgage in 1885, long prior to the commencement of this proceeding or the rendition of any decision herein. Both of the requisites necessary to create privity, as stated by Mr. Black, were therefore lacking.

III.

**The facts as to the cause of accident alleged in the answer of The Oregon Railroad & Navigation Company constituted a good defence.**

If the Ocklahama and her owner, the Oregon Railroad & Navigation Company, were not bound by the proceedings had prior to the seizure, then that company was entitled to defend, and to have any defence interposed by

it disposed of in the ordinary way as the result of a hearing. The opinion of the Circuit Court of Appeals on the second appeal (Record, p. 575) shows that the merits of the defense undertaken to be made were never considered by that court, and that the decision rested solely on the ground that the Ocklahama and the appellant were bound by the prior proceedings. It may be that the defense was not good, but nevertheless the appellant had a right to have such defense passed upon by the court.

The defense made was true in fact and good in law. The answers of the appellant (Record, pp. 475, 481, 488, 495) alleged that the Oregon Short Line & Utah Northern Railway Company was in the possession of all of the property of the Oregon Railroad & Navigation Company, including the Ocklahama and the barge Columbia, and had sole and exclusive possession and management of said boats during the month of October, 1892; that, on the 19th day of October, Balfour, Guthrie & Co. loaded upon the barge Columbia a cargo of wheat, to be transported by said barge from Portland, Oregon, to Astoria, Oregon; that said barge was under the charge of a captain, who had no connection with any other boat or vessel than the Columbia, and that the captain of said barge, for and on behalf of the said Columbia, executed and delivered to said Balfour, Guthrie & Co. a shipping receipt for the wheat so loaded; that the said barge Columbia was, on the 19th day of October, 1892, taken in tow by some boat or vessel other than the Ocklahama and was towed from the dock at which she had been loaded to a point or place in the City of Portland known as the boneyard, and there remained from the 19th day of October, 1892, until the afternoon of the 21st day of October,

1892; that on the afternoon of the 21st day of October, 1892, the steamboat Ocklahama took said barge Columbia in tow for the purpose of towing the said barge Columbia from the boneyard in Portland to the dock of the Oregon Railway & Navigation Company, then operated by the Oregon Short Line & Utah Northern Railway Company, at Astoria, Oregon, at which said dock the said Ocklahama was to leave the said barge, and was not expected or intended to further tow said barge; that no contract was made with the said Ocklahama by the said Balfour, Guthrie & Co. for the towage of said barge; that on the arrival of the said Ocklahama with the said barge at the dock at Astoria, the said Ocklahama was under orders to return immediately to Portland, leaving the said barge along the said dock. The answers then allege the facts concerning the voyage to Astoria and the striking of the pontoon, and the taking of the barge behind the dock, and the placing of the same in a safe position alongside of the dock, as found by the decree of the district court (Record, p. 84). The answers then allege that, after the said barge had rested against the dock for an hour and a half, the master of the barge negligently caused the cargo on the deck of the barge to be shifted until the barge was on an even keel and was no longer resting against this dock; that by reason of such negligence the barge was caused to list, and the loss of the wheat and the injury to Short and Peterson thereupon followed; that while the barge remained against the dock the cargo of said barge might easily have been removed from the dock; that the steamer Ocklahama did not in any way cause the said injury; that the same was caused solely by reason of the negligence of the captain of the barge, as aforesaid; that the

injury to said wheat was caused solely by a peril over which the said Ocklahama and her officers and crew had no control, and that said injury could not have been prevented by the exercise of any care on the part of the said Ocklahama or her officers and crew; that it was not intended that the said Ocklahama should tow the said barge Columbia any further than to the said dock at Astoria, Oregon, and that said barge was to be delivered to the ship Westgate by some other tug, and that no contract was ever made with the said steamer Ocklahama or her owners for the towage of the said barge Columbia to the said Westgate, and that the only contract existing for the towage of the said barge was that resulting by operation of law from the facts hereinbefore stated; that no libel had ever been filed in the cause against the said Ocklahama or her owners or charterers.

The Circuit Court of Appeals, in its first opinion, assumed that a contract had been made by the Ocklahama to tow the Columbia to the Westgate, and that the voyage of the Ocklahama was not ended when the accident happened. The answer negatives any such assumption of fact, and shows that the contract of carriage was made by the Columbia; that the towage services of the Ocklahama were ended before the loss of the wheat; that the wheat was placed by the Ocklahama in a safe position; and that the injury occurred by reason of the negligence of Ferguson alone.

The Columbia and the Ocklahama are separate and distinct things. Each had its owner, its general creditors and its lienors.

Each is subject to separate and distinct liens arising as a result of maritime contracts made on behalf of the

vessel or of maritime torts committed by it. Maritime liens cannot be extended by construction, analogy or inference. This principle and the nature of a maritime lien is clearly stated in the case of *Vandewater v. Mills*, 19 How. 89, as follows:

"The maritime 'privilege' or lien is adopted from the civil law, and imports a tacit hypothecation of the subject of it. It is a '*jus in re*,' without actual possession or any right of possession. It accompanies the property into the hands of a *bona fide* purchaser. It can be executed and divested only by a proceeding *in rem*. This sort of proceeding against personal property is unknown to the common law, and is peculiar to the process of courts of admiralty. The foreign and other attachments of property in the state courts, though by analogy loosely termed proceedings *in rem*, are evidently not within the category. But this privilege or lien, though adhering to the vessel, is a secret one; it may operate to the prejudice of general creditors and purchasers without notice; it is therefore '*stricti juris*,' and cannot be extended by construction, analogy or inference. 'Analogy,' says Pardessus (Droit Civ., Vol. 3, p. 597), 'cannot afford a decisive argument, because privileges are of strict right.' They are an exception to the rule by which all creditors have equal rights in the property of their debtor, and an exception should be declared and described in express words; we cannot arrive at it by reasoning from one case to another."

The law creates no lien on a vessel as a security for the performance of a contract to transport a cargo until some lawful contract of affreightment is made and the cargo is shipped under it.

*The Freeman v. Buckingham*, 18 Howard, 388.
*Vandewater v. Mills*, 19 How. 89.
*The Keokuk*, 9 Wallace, 517.

In the present case the contract of affreightment was made by the master of the barge Columbia, and the shipping receipt was issued by said master on behalf of the barge. Such a contract of affreightment could create no lien against the Ocklahama. The Ocklahama, if negligent in towing the barge, might, as a result of such tort, become subject to a lien in favor of the barge or its cargo, but cannot be made subject to a lien in favor of the cargo of the Columbia as a result of the contract of affreightment made on behalf of the Columbia. It cannot be said that because a tugboat assists in towing a vessel, such tugboat becomes, as a result of such act, subject to a lien for the performance of all of the contracts of affreightment entered into by the vessel in respect to the freight shipped thereon.

It is undoubtedly true that it is not absolutely necessary that the merchandise received under a contract of affreightment shall actually be physically placed in the vessel.

*Buckley v. Naumkaeg Company*, 24 Howard, 386.

It is stated by this court in that opinion (p. 389) that the "condition of the Bay of Mobile, which is somewhat peculiar, because material to the proper understanding of the question in this case." It is then stated that vessels of large size and drawing over a given depth of water cannot pass the bar in the bay, which is situated at a considerable distance below the city, and that the cargo of such vessels is brought to them in lighters from the city over the bar, and then laden on board the vessel. It is stated (p. 389) that from the agreed statement of facts it

appears that the master of the vessel then lying at the Port of Mobile agreed to carry for the libelant 770 bales of cotton from that port to Boston. The custom of the port was shown in evidence, and it was held that the delivery to a lighterman as the agent of the ship was a delivery to the master of the ship, so as to render the ship liable for the performance of the contract of affreightment. It will be noted that a contract of affreightment was actually entered into on the part of the ship, and the only question involved in the case was as to what constituted a delivery. The opinion nowhere states, however, that a delivery to the lighter without a contract on the part of the ship would render the ship liable for the acts of the lighter.

Any such result is contrary to the principles stated in The Keokuk, 9 Wallace, 517. In that case it is clearly held that the law creates no maritime lien on a vessel as security for the performance of a contract to transport a cargo unless some contract of affreightment on behalf of the vessel has been made, and that, under the fact, no contract was shown, and hence the Keokuk was not liable for the loss of the grain on the barge.

The Keokuk, supra, and the Northern Belle, 9 Wallace, 522, show the manner of handling grain in bulk upon the Western rivers. Barges are left at various places along the river, to be loaded by the shippers with grain in bulk delivered from elevators. (9 Wall. 528.) During the time of loading, the barge is under the control of the shipper, and is simply a receptacle into which the grain may be placed. From time to time steamboats arrive, make contracts for the carriage of the grain, and convey the grain to its destination. When contracts of affreightment are made by the steamer, then, on the prin-

ciple established in the case of *Buckley v. Naumkaeg*, 24 Howard, 386, the steamer becomes responsible for the safe delivery of the grain, and becomes subject to a lien for any breach of the contract of affreightment.

This court has directly held, in the case of the J. P. Donaldson, 167 U. S. 599, 603, that a tug towing a barge is not liable as an insurer for the cargoes on board the barge, and that the owners of the barge or the cargoes could not maintain any action for the loss of either against the tug or her owners, without proving negligence on the part of the tug.

In the present case the contract of affreightment was made with the barge Columbia, and no contract of any kind whatsoever for the carriage of the goods was made for or on behalf of the Ocklahama. It is true that both boats were owned by the Oregon Railway & Navigation Company; but it is equally true that the Farmers' Loan & Trust Company had an interest in the Ocklahama, which can only be divested as the result of a maritime lien against that vessel.

Under the decision of this court in the J. P. Donaldson, supra, the Ocklahama could only be held liable as a result of a tort committed by the Ocklahama. The answer alleges and the courts below found that no such tort had been committed by the Ocklahama, and hence it follows that there is no lien against that vessel.

In the case of Sturges v. Boyer, 24 How. 110, a tug towing a ship was alone held liable for a collision to a third vessel. That result was reached for the reason that the fault causing the collision was committed by the tug alone and the reasoning of the court on page 122 clearly shows that in cases where the tow alone was at fault, the tug would not be subject to any lien.

The decision in The Bordentown, 40 Federal Reporter, 687, is clearly against the position taken by the Circuit Court of Appeals, and holds that, no matter how many boats owned by the same person may be engaged in the performance of the same service or contract, the owner may limit his liability by a surrender of the boat or boats at fault, and need not surrender the others. The Pennsylvania Railroad Company, the owner of three tugs, The Bordentown, The Winnie and The Willie, engaged to take a fleet of canal-boats or barges from South Amboy to the sea fence in Brooklyn. The tow left South Amboy in charge of The Winnie and The Willie. Soon after leaving South Amboy the tow was joined by The Bordentown, which boat took charge of the fleet. The Willie detached a portion of the tow and landed it safely at the Standard Oil Company's dock near Port Johnson, and The Bordentown and The Winnie proceeded with the tow. After passing the mouth of the Kills and entering the bay, the water was found to be very rough, and it was deemed unsafe to proceed to the sea fence at Brooklyn on account of the direction of the wind making that place unsafe to moor the tow. The tow then proceeded in the direction of the American docks, but after going in this direction for a time the wind shifted, so as to render these docks an unsafe mooring-place. The fleet was then headed in the direction of the Kills, but had not gone far in this direction when it was joined by The Willie, whose captain had come from Port Johnson after having landed his detachment of the tow at that point, to render any assistance to The Bordentown that might be needed (p. 685). The captain of The Willie reported that the water was very rough at the mouth of the Kills, and the pilot of The Bordentown determined

again to cross the bay to Brooklyn. After having proceeded in this direction for a distance, the Hughes, the port hawser boat, sunk on account of filling with water, and parted the port hawser. The tow then got loose from the tugs and pounded each other in the open sea, and many of the boats were lost. The Winnie rescued one boat, and The Willie two others. The railroad company offered to surrender the three boats. It was held that the fault was committed in undertaking to cross the bay, and that as The Willie was not present at the time the first attempt was made, she need not be surrendered.

It will be noted, however, that The Willie started with the tow, and afterwards returned to it to render any service needed, and was at all times performing some service in connection with the tow. On the theory of the Circuit Court of Appeals, she was pledged to the performance of the work, and must therefore be surrendered. She was held, however, not to be a party to the fault, and therefore need not be surrendered.

The result in The Bordentown shows that where several tugs belonging to the same person engage in the same service, only those tugs actually at fault are liable. Such a result is supported by the decision of this court in the cases cited in The J. P. Donaldson, 167 U. S. 599. On the theory contended for by respondents, every towboat handling a ship, and every barge lightering a part of a ship's cargo, would be responsible for all the contracts of the ship, not only while performing service for the ship, but also after such service was ended. Such is not the law. Even while engaged in service, a tug is not liable for the contracts of the tow, but only for negligence.

The J. P. Donaldson, 167 U. S. 599.

The contract of carriage in the present case was made with the Columbia alone. The answer shows that the Ocklahama was not negligent; that the services of the Ocklahama were ended when the accident occurred. Under these circumstances, no maritime lien exists against the Ocklahama in favor of the respondents, Balfour, Guthrie & Co.

Marshall Short was captain, and John August Peterson was a deckhand, on the Ocklahama. They were killed through the negligence of Ferguson, the captain of the barge Columbia. By what process of reasoning can it be held that the Ocklahama was subject to a maritime lien in favor of the representatives of Short and Peterson?

For the reasons stated, the decree rendered by the court below should be reversed.

W. W. COTTON,
For Appellants.

A. B. BROWNE, of Counsel.

FILED
SEP 22 1900
JAMES H. MCKENNEY
Clerk

Brf. of Cotton & Browne for Co. Ry. Co. et al.

IN THE

# SUPREME COURT

Filed Sept. 22, 1900.

OF THE

UNITED STATES

OCTOBER TERM, 1899.

THE OREGON RAILROAD & NAVIGATION COMPANY, *Appellant*,
*v.*
ROBERT BALFOUR, *et al.*, partners doing business as BALFOUR, GUTHRIE & COMPANY, *et al.* — No. 313.

THE OREGON RAILWAY & NAVIGATION COMPANY and THE OREGON SHORT LINE & UTAH NORTHERN RAILWAY COMPANY, *Appellants*,
*v.*
ROBERT BALFOUR, *et al.*, partners doing business as BALFOUR, GUTHRIE & COMPANY, *et al.* — No. 314.

*Appeal from the Circuit Court of Appeals for the Ninth Circuit.*

## Brief for the Oregon Railway & Navigation Company and the Oregon Short Line & Utah Northern Railway Company.

W. W. COTTON,
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*Of Counsel.*

PORTLAND, OREGON:
F. W. BALTES AND COMPANY, PRINTERS, 228 OAK STREET.
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## Brief for the Oregon Railway & Navigation Company and the Oregon Short Line & Utah Northern Railway Company.

All of the facts and proceedings had in this case are stated at length in the brief filed herein on behalf of the Oregon Railroad & Navigation Company, and reference

will be made herein to the facts only for the purpose of showing what questions are presented by the appeal of these appellants.

In October, 1892, the barge Columbia and the steamer Ocklahama were owned by the Oregon Railway & Navigation Company, but were leased to the Oregon Short Line & Utah Northern Railway Company for a period of ninety-nine years, and the Oregon Short Line & Utah Northern Railway Company was exclusively operating said barge and steamer. On the 19th of October, 1892, Balfour, Guthrie & Co. loaded upon the barge Columbia a cargo of wheat to be transported upon said barge from Portland, Oregon, to Astoria, Oregon. The barge was under the charge of a captain who had no connection with any boat or vessel other than the Columbia; and the captain of said barge, for and on behalf of the Oregon Shon Line & Utah Northern Railway Company, executed and delivered to Balfour, Guthrie & Co. a shipping receipt for the wheat so loaded. Afterwards, but on the same day, the Columbia was taken in tow by some boat or vessel other than the Ocklahama, and was towed from the dock at which she had been loaded to a place in the City of Portland known as the "boneyard," and there remained from the 19th of October, 1892, until the afternoon of the 21st of October. During the afternoon of the 21st of October, the Ocklahama took the Columbia in tow for the purpose of towing the Columbia from the boneyard in Portland to the dock at Astoria of the Oregon Railway & Navigation Company, then operated by the Oregon Short Line & Utah Northern Railway Company. Marshall B. Short was captain of the Ocklahama, and John August Peterson was a deckhand on the Ocklahama. While making a landing at the dock at Astoria the Columbia struck a floating pontoon, which was kept next the wharf as a fender, and the Columbia sprung a leak. The persons in

charge of the Columbia deemed it advisable to remove the barge into more shallow water, and the barge was therefore taken behind the dock, where she rested on the bottom of the Columbia river, and was listed against the dock in a safe position. Afterwards the captain of the barge, one Ferguson, caused a portion of the cargo to be shifted until the barge was on an even keel and was no longer resting against the dock. At the time the cargo was shifted the tide was ebbing, and after the barge came to an even keel she rested in that position for a short time. The tide having ebbed and the barge having no lateral support, she keeled over away from the dock, striking her bilge on the bottom of said river with great force, causing the cargo to shift and carry away her deckhouse, and a large part of the cargo slid into the river and the hull of the barge was broken down by the shock. This accident happened three hours after the barge had been placed behind the dock. (Record, p. 136.) Marshall B. Short and John August Peterson, who were in the hull of the barge, were killed. After the accident, the Oregon Railway & Navigation Company and the Orgon Short Line & Utah Northern Railway Company, as lessee, filed in the district court of the United States for the district of Oregon their petition praying for a limitation of the personal liability of the petitioners arising out of the damage done by the destruction of the Columbia. (Record, p. 1.)

No attempt was made to limit their liability as owners of the Ocklahama, and no offer to surrender the Ocklahama was made.

After the filing of the petition the district court appointed appraisers to ascertain the value of the Columbia (Record, p. 8), and these appraisers determined the value of the barge to be $100. (Record, p. 9.) On December 6, 1892, the Oregon Railway & Navigation Company and the Oregon Short Line & Utah Northern Railway Com-

pany gave a bond for the appraised value of the barge (Record, p. 10); and on the 12th day of December, 1892, the district court made an order reciting the proceedings already had and decreeing that "the prosecution of all suits and proceedings against the Oregon Short Line & Utah Northern Railway Company or the Oregon Railway & Navigation Company, in respect to any claim for damages for any loss, destruction, damage or injury occasioned on the 21st and 22d days of October, 1892, or her (the barge Columbia's) loss or destruction, be and the same is hereby restrained." (Record, p. 12.)

Balfour, Guthrie & Co., the owners of the wheat lost (Record, p. 17), Malvina Short, as administratrix of the estate of Marshal B. Short (Record, p. 28), Sven Anderson, as administrator of the estate of John August Peterson (Record, p. 32), Annie C. Larson, mother of John August Peterson (Record, p. 38), and William Boyce (Record, p. 22), appeared in the proceedings and filed answers to the petition and resisted the claim of petitioners to a limitation of liability. It will be observed from a reading of the answers filed by the respondents that no relief was sought against the steamer Ocklahama by any of the respondents, but that in and by each of said answers, judgments *in personam* were prayed against the Oregon Short Line & Utah Northern Railway Company or against the Oregon Short Line & Utah Northern Railway Company and the Oregon Railway & Navigation Company.

Testimony was taken before Bellinger, district judge, (Record, pp. 103-387), and, after argument, that judge handed down a written opinion (Record, p. 86), in which the conclusion was reached that the petitioners were entitled to limit their liability to the value of the Columbia. As the result of this opinion, a decree to that effect was entered February 19, 1894. (Record, p. 84.) By that decree the petitioners were ordered to pay into court $100;

and the clerk of the court was ordered to pay one-third of this amount to Balfour, Guthrie & Co., one-third thereof to William Boyce, and one-third thereof to Malvina Short, Sven Anderson and Anna C. Larsen.

From this decree Malvina Short, as administratrix, Sven Anderson, as administrator, and Balfour, Guthrie & Co. appealed (Record, p. 91); and their appeal was allowed (Record, p. 100). The appeal was taken by Balfour, Guthrie & Co., in their firm name, without specifying the names of the persons constituting the partnership. No citation issued upon this appeal, but a notice signed by the proctors for the persons appealing, and directed to the Oregon Railway & Navigation Company and the Oregon Short Line & Utah Northern Railway Company, and their proctor was served. No service of any citation or notice was made upon William Boyce or Anna C. Larsen, and no appeal was taken by either Boyce or Larsen.

When the appeal came on for hearing in the Circuit Court of Appeals, the Oregon Railway & Navigation Company and the Oregon Short Line & Utah Northern Railway Company moved the court to dismiss the appeal upon the grounds: First, the proceedings were irregular, because the appeal was taken by Balfour, Guthrie & Co. in their firm names, without naming the individuals composing the firm; and, second, because the decree was a joint decree, and Boyce and Larsen had not joined in the appeal, had not taken an appeal, and had not been barred of their right to appeal by any proceedings in the nature of summons and severance.

The motion to dismiss the appeal was heard by Mr. Justice McKenna, then circuit judge, and District Judges Hanford and Hawley, and the appeal was dismissed (Record, p. 399). The opinion of the court was delivered by Hanford, district judge, and will be found in the Record, page 388. The appellants moved for a rehearing, and this

was granted (Record, p. 391). On the rehearing an argument was had before McKenna, Gilbert and Ross, circuit judges. The motion to dismiss the appeal was overruled, and the decree of the district court reversed, and the cause remanded to the district court for further procedings (Record, p. 406). The opinion of the court was delivered by Ross, circuit judge, and will be found in the Record, page 393. Mr. Justice McKenna dissented from the conclusion of the court overruling the motion to dismiss the appeal, but concurred in the conclusion of the court as to the merits (Record, p. 406).

As stated in the opinion of the Circuit Court of Appeals (Record, p. 404), the principal reasons assigned by the respondents against allowing the Oregon Short Line & Utah Northern Railway Company and the Oregon Railway & Navigation Company to limit their liability to the value of the barge were, first, that the Columbia was, from the inception of the voyage, unseaworthy, and, second, that the Columbia and the Ocklahama were, in law, one vessel; and that in order to avail themslves of the benefit of the limited liability act the owners must surrender the Ocklahama as well as the Columbia in satisfaction of the loss and damage complained of.

Upon the question of the seaworthiness of the barge and the cause of the accident the district court in its decree (Record, p. 84), found that the barge was seaworthy and that the accident occurred solely through the negligence of Ferguson, the captain of the barge.

The district court, in the opinion delivered, (Record, p. 89), held that the Ocklahama and the Columbia were not within the meaning of the limited liability act one vessel; and having held that the Ocklahama did not in any way cause the accident, it was therfore decreed that the railway companies could limit their liability to the value of the Columbia.

All of the findings of fact made by the district court were by the Circuit Court of Appeals sustained and accepted as conclusive (Record, p. 404). The decree of the district court was reversed solely because of the fact that the Circuit Court of Appeals was of the opinion that the Ocklahama and the Columbia constituted one vessel; that both of said vessels were pledged for the faithful performance of the contract entered into by the captain of the Columbia with Balfour, Guthrie & Co. for the transportation of their wheat; and that it was immaterial whether the officers of the Columbia or of the Ocklahama made the contract of carriage or whether the negligence of the Columbia alone caused the accident (Record, pp. 404-406).

During the first trial in the district court the respondents made no attempt to seize the Ocklahama, and did not seek to have her brought into court. The amount sought to be recovered by the respondents was far in excess of the value of the Ocklahama, and, therefore, the respondents were not and could not have been satisfied with anything less than full personal liability on the part of these appellants. During the pendency of the first appeal, receivers of the property of both of the petitioners had been appointed, and suits commenced to foreclose mortgages upon the property owned by them. When the mandate was entered in the district court the petitioners were no longer able to surrender the Ocklahama and thus limit their personal liability, and the position of the respondents had also changed. The respondents no longer sought personal liability, but wished to have the Ocklahama brought into court and be subjected, without any further hearing, to the demands of the respondents to the same extent as if the proceeding had been one *in rem* against the Ocklahama. Acting upon the suggestion of the respondents, the district court on receiving the mandate of the Circuit Court of Appeals, caused seizure to be made of the Ocklahama. E. McNeill, then

receiver of the Oregon Railway & Navigation Company, appointed in a suit to foreclose a mortgage made in 1885 upon all the property of the Oregon Railway & Navigation Company, filed his petition alleging his interest and sought to have the Ocklahama returned to him (Record, p. 455). This petition was denied (Record, p. 458). The Oregon Railroad & Navigation Company afterwards purchased the Ocklahama at the foreclosure sale had under said mortgage, and after such purchase appeared and filed a petition setting up its interest in the Ocklahama, and prayed leave to defend (Record, p. 464). Afterwards the Oregon Railway & Navigation Company gave a bond for the value of the Ocklahama and undertook to defend by filing answers to the only pleadings on file which would seem to require an answer, namely, the answers of the respondents to the petition to limit liability. The answers of the Oregon Railroad & Navigation Company will be found in the Record at pages 475, 481, 488 and 495. Exceptions were filed to these answers by all of the respondents on the ground that the defenses therein contained were immaterial, impertinent and ***res judicata***. The exceptions were sustained and the Oregon Railroad & Navigation Company was not allowed to defend. On December 20, 1897, findings were made as to the damages suffered by Balfour, Guthrie & Co., Malvina Short, as administratrix, Sven Anderson, as administrator, and Anna C. Larsen and it was found that Balfour, Guthrie & Co. had suffered damages in the sum of $16,018.79; that Malvina Short, as administratrix, had suffered damages in the sum of $5,000; that Sven Anderson, as administrator, had suffered damages in the sum of $3,000, and that Anna C. Larsen had not sustained any damage. Thereupon an order was made for the distribution of the appraised value of the Ocklahama, and the Oregon Railroad & Navigation Company was required to pay into the registry of the court the sum of $86,000, the ap-

praised value of said steamer; and it was further ordered that when said sum was paid the petition to limit liability of the Oregon Railway & Navigation Company and the Oregon Short Line & Utah Northern Railway Company should be allowed (Record, p. 513).

From this decree the Oregon Railway & Navigation Company, the Oregon Short Line & Utah Northern Railway Company and the Oregon Railroad & Navigation Company appealed to the Circuit Court of Appeals (Record, pp. 516-562).

The appeals so taken were heard by the Circuit Court of Appeals for the ninth circuit, and the decree of the district court was, in all respects, affirmed. The opinion of the Circuit Court of Appeals will be found in the Record, p. 575.

On the 6th day of March, 1899, (Record, p. 594), the Oregon Railroad & Navigation Company filed in the Circuit of Appeals its petition for an appeal to this court, and in connection with said petition filed an assignment of errors (Record, p. 601). The Oregon Railway & Navigation Company and the Oregon Short Line & Utah Northern Railway Company filed their petition for an appeal to this court, and in connection with said petition, filed their assignment of errors (Record, p. 603). Gilbert, circuit judge, on the 4th day of April, 1899, duly allowed the said appeals, as shown by the orders appearing in the Record, pages 608, 609.

In connection with their appeal the Oregon Railway & Navigation Company and the Oregon Short Line & Utah Northern Railway Company now make the following

## ASSIGNMENT OF ERRORS.

First—The Circuit Court of Appeals erred in reversing the decree of the district court of the United States for the district of Oregon, entered on the 19th day of February,

1894, which decree was on the 26th day of February, 1894, duly modified by the order of said district court.

Second—The Circuit Court of Appeals erred in holding that the original decree of the district court for the district of Oregon, on the 19th day of February, 1894, (Record, p. 84), was not a decree jointly affecting Robert Balfour and others, doing business as Balfour, Guthrie & Co.; Malvina Short, administratrix; Sven Anderson, administrator; Anna C. Larsen and William Boyce, and erred in overruling the motion of the Oregon Railway & Navigation Company and of the Oregon Short Line & Utah Northern Railway Company to dismiss the appeal from said decree taken alone by Robert Balfour and others, doing business as Balfour, Guthrie & Co.; Malvina Short, administratrix, and Sven Anderson, administrator, and erred in hearing said appeal and reversing said decree of February 19, 1894, as the result of such hearing.

Third—The Circuit Court of Appeals in its decree made and entered on the first appeal herein erred in decreeing that these appellants the Oregon Railway & Navigation Company and the Oregon Short Line & Utah Northern Railway Company could not limit their liability for the damage done by the barge Columbia without surrendering the steamer Ocklahama.

Fourth—The Circuit Court of Appeals in its decree made and entered on the first appeal herein erred in decreeing that the barge Columbia and the steamer Ocklahama constituted but one vessel within the meaning of the act of congress entitled An Act to Limit the Liability of Shipowners, and for Other Purposes, approved March 3, 1871, and the various statutes in addition thereto and amendatory thereof, and in decreeing that these appellants could not limit their liability in respect to the matters and things mentioned and described in the petition filed by these appellants under said acts without surrendering the Ockla-

hama, and erred in reversing on said ground the decree of the district court of the United States for the district of Oregon made and entered in said court on the 19th day of February, 1894, and modified on the 26th day of February, 1894.

Fifth—The Circuit Court of Appeals in its decree made and entered upon the first appeal made herein erred in decreeing that the steamer Ocklahama or these appellants as the owner or lessee thereof respectively, were in any way liable to Robert Balfour and others, partners, doing business as Balfour, Guthrie & Co., or to Malvina Short, administratrix of the estate of Marshall B. Short, deceased, or to Sven Anderson, administrator of the estate of John August Peterson, deceased, or to Anna C. Larsen, by reason of any act or thing done or committed by the said Ocklahama or the persons having her in charge, and erred in reversing on said ground the decree of the district court of the United States for the district of Oregon made and entered on the 19th day of February, 1894, and modified on the 26th day of February, 1894.

Sixth—The Circuit Court of Appeals in its decree made and entered upon the second appeal herein erred in affirming the decree of the district court of the United States for the district of Oregon made and entered in said district court on August 2d, 1897, and re-entered in said district court on the 20th day of December, 1897, for the reason that under the mandate of the said United States Circuit Court of Appeals entered in said district court on March 16, 1896, the said district court had no jurisidiction to enter any personal judgment or decree against these appellants or either of them, except for the costs of said proceeding.

Seventh—The Circuit Court of Appeals in its decree made and entered upon the second appeal herein erred in affirming the decree of the district court of the United States for the district of Oregon made and entered in said

court on August 2d, 1897, and re-entered on the 20th day of December, 1897, for the reason that said district court had no jurisdiction to enter any decree under the mandate of the Circuit Court of Appeals imposing any liability upon these appellants, or either of them, or upon the steamer Ocklahama.

Eighth—The Circuit Court of Appeals in its decree made and entered upon the second appeal herein erred in affirming the decree of the district court of the United States for the district of Orgon made and entered in said court on August 2d, 1897, and re-entered on the 20th day of December 1897, for the reason that said district court in said decree erred in ordering and decreeing the payment into court of the value of the steamer Ocklahama or the delivery to trustees of said steamer or of any interest in said steamer as a condition to the right of these appellants, or either of them, to limit its or their liability in respect to the matters and things alleged in the petition of these appellants initiating this proceeding and filed in said district court on the 29th day of November, 1892.

Ninth—The Circuit Court of Appeals in its decree made and entered upon the second appeal herein erred in affirming the decree of the district court of the United States for the district of Oregon made and entered in said court on August 2d, 1897, and re-entered on the 20th day of December, 1897, for the reason that the said decree of the district court so affirmed was not in accordance with the opinion of the said United States Circuit Court of Appeals in this proceeding rendered on the first appeal and is inconsistent therewith.

Tenth—The Circuit Court of Appeals in its decree made and entered upon the second appeal herein erred in affirming the decree of the district court of the United States for the district of Oregon made and entered in said court on August 2d, 1897, and re-entered on the 20th day of De-

cember, 1897, for the reason that the said district court erred in seizing the steamer Ocklahama, and in making the said decree so affirmed for the reason that said district court was without power or authority in this cause to issue process against the Ocklahama or to cause the Ocklahama to be seized.

Eleventh—The Circuit Court of Appeals in its decree made and entered upon the second appeal herein erred in affirming the decree of the district court of the United States for the district of Oregon made and entered in said court on August 2d, 1897, and re-entered on the 20th day of December, 1897, because the district court erred in seizing the Ocklahama, and in entering said decree for the reason that this proceeding was commenced by these appellants to limit their personal liability and was a suit in personam, and that the seizure of the said Ocklahama and that the decree of the district court so affirmed changed the said proceeding in personam rising out of a collision into a proceeding in rem, and such action is contrary to the admiralty rules and practice of the Supreme Court of the United States.

Twelfth—The Circuit Court of Appeals in its decree made and entered upon the second appeal herein erred in affirming the decree of the district court of the United States for the district of Oregon made and entered in said court on August 2d, 1897, and re-entered on the 20th day of December, 1897, because the district court in said decree erred in decreeing that the steamer Ocklahama or her value should be surrendered in order that these appellants, and each of them, might limit its or their liability to the said Robert Balfour and others, the respondents herein, for the reason that there was no evidence showing that the towage services of the steam tug Ocklahama were not fully performed when the said barge Columbia was placed alongside the dock at Astoria, but on the contrary, the evidence

shows that the said services of the said Ocklahama were at the time of the alleged injuries to said respondents, and each of them, fully performed.

Thirteenth—The Circuit Court of Appeals in its decree made and entered upon the second appeal herein erred in affirming the decree of the district court of the United States for the district of Oregon made and entered in said court on August 2d, 1897, and re-entered on the 20th day of December, 1897, because the district court erred in seizing the steamer Ocklahama in this proceeding and decreeing that the steamer Ocklahama or her value should be limited in order that these appellants, or each of them, might limit its or their liability for the damages mentioned in the petition of these appellants initiating this proceeding and filed in the district court on the 29th day of November, 1892, for the reason that these appellants have never sought to limit their liability, or the liability of either of them, for any damages caused or done by the said steamer Ocklahama.

Fourteenth—The Circuit Court of Appeals in its decree made and entered upon the second appeal herein erred in affirming the decree of the district court of the United States for the district of Oregon made and entered in said court on August 2d, 1897, and re-entered on the 20th day of December, 1897, because the district court erred in seizing the Ocklahama, and erred in decreeing that the said Ocklahama or her value should be surrendered in this proceeding, for the reason that if these appellants, or either of them, were not entitled by reason of the filing of the petition initiating this proceeding and by reason of the payment into court of the appraised value of the barge Columbia, and the other matters and things done by these appellants to limit their liability, and the liability of each of them, to the said Robert Balfour and others and to the estates of Marshall B. Short and John August Peterson and Anna C.

Larsen. Then and in that event it was the duty of the said district court, under the rules and practice in such cases made and provided, to have dismissed this proceeding and to have allowed the said Robert Balfour and others and the administratrix of the said estate of Marshall B. Short, and the administrator of the estate of John August Peterson and Anna C. Larsen to have taken such remedy as they, or either of them, might have been advised against these appellants, or either of them, or else to have confined the relief granted to the said Robert Balfour and others and the said adminstratrix and administrator and the said Anna C. Larsen to personal decrees and judgments against the Oregon Railway & Navigation Company or the Oregon Short Line & Utah Northern Railway Company, or both, as the court might have been advised under the evidence and findings of fact.

Fifteenth—The Circuit Court of Appeals in its decree made and entered upon the second appeal herein erred in affirming the decree of the district court of the United Sates for the district of Oregon made and entered in said court on August 2d, 1897, and re-entered on the 20th day of December, 1897, because the district court erred in decreeing that the steamer Ocklahama should be seized or the said steamer or her value surrendered in this proceeding, for the reason that such relief so decreed is improper under the rules and practice in proceedings of this character.

Sixteenth—The Circuit Court of Appeals in its decree made and entered upon the second appeal herein erred in affirming the decree of the district court of the United States for the district of Oregon made and entered in said court on August 2d, 1897, and re-entered on the 20th day of December, 1897, because the district court in decreeing that Robert Balfour and others, doing business as partners under the name of Balfour, Guthrie & Co.; Malvina Short, administratrix of the estate of Marshall B. Short, deceased,

and Sven Anderson, administrator of the estate of John August Peterson, deceased, or either of them, should have or recover any sum whatsoever against appellant the Oregon Railway & Navigation Company, for the reason that it appears from the pleadings, evidence and findings of fact made by the district court that the said appellant the Oregon Railway & Navigation Company had long prior to the date of the alleged injuries to said persons, or any of them, duly leased to the Oregon Short Line & Utah Northern Railway Company the said barge Columbia and said steamer Ocklahama, and that the same, and each of them, were exclusively and solely operated at the time of said injuries by the Oregon Short Line & Utah Northern Railway Company, and the Oregon Railway & Navigation Company had no interest of any kind whatsoever in said operation and had made no contract for the carriage of the wheat belonging to said Robert Balfour and others, and had not in its employ the said Marshall B. Short and the said John August Peterson, and was not liable to the said persons, or either of them, for any injuries received by them, or either of them.

## ARGUMENT.

The Assignment of Errors raises, among others, the following points:

First—The motion to dismiss the appeal from the original decree of the district court should have been allowed.

Second—The Oregon Railway & Navigation Company and the Oregon Short Line & Utah Northern Railway Company were entitled to limit their liability without a surrender of the Ocklahama.

Third—The district court had no jurisdiction to make any decree for damages against either the Oregon Railway & Navigation Company or the Oregon Short Line & Utah

Northern Railway Company, but should have simply dismissed the proceeding and dissolved the injunction.

Fourth—The Oregon Railway & Navigation Company was not liable to either of the respondents.

I.

**The motion to dismiss the appeal from the original decree of the District Court should have been allowed.**

This court has repeatedly held that all parties against whom a joint decree is rendered must all appeal or be barred of their right to appeal by summons and severance.

Owings v. Kincannon, 7 Peters, 399.
Masterson v. Herndon, 10 Wall. 416.
Hampton v. Rouse, 13 Wall. 187.
Simpson v. Greeley, 20 Wall. 152.
Sipperly v. Smith, 155 U. S. 86.
Inglehart v. Stansbury, 151 U. S. 70.
Hardee v. Wilson, 146 U. S. 179.

Three of the judges of the said circuit, to wit, Mr. Justice McKenna, and District Judges Hanford and Hawley, held in this case that the original decree of the district court was a joint decree within the meaning of the decisions of this court above cited, and therefore dismissed the appeal (Record, p. 388). Afterwards on a rehearing, Circuit Judges Gilbert and Ross, Mr. Justice McKenna dissenting, held that the original decree of the district court was not a joint decree, and therefore heard the appeal. (Record, p. 393.)

It is believed that the first decision of the Circuit Court of Appeals correctly applied the law.

Section 4283 of the Revised Statutes of the United States provides that, in the cases therein mentioned, the liability of the owner of any vessel for loss or damage shall not exceed the amount or value of the interest of such

owner in such vessel and her freight then pending. The act does not provide how the shipowner shall avail himself of the limitation upon his liability thus created. In commenting upon Section 4284, this court, in *Norwich Co. v. Wright*, 13 Wall. 123, says: "The act does not state what court shall be resorted to nor what proceedings shall be taken." *In Providence & N. Y. S. S. Co. v. Hill Manufacturing Co.*, 109 U. S. 590, Mr. Justice Bradley, commenting upon the case of the *Norwich Transportation Co. v. Wright*, says that as a result of the decision in the case mentioned, the court felt called upon to adopt some general rules for the better carrying out of the act to limit the liability of owners of vessels; and as a result the present rules governing the procedure were shortly afterwards announced. The object and purpose of these rules is thus stated in the opinion of the Circuit Court of Appeals dismissing the appeal in this case (Record, p. 389): "The rules promulgated by the Supreme Court above referred to make all persons having claims for damages, growing out of a marine casualty, proper parties to any proceeding to limit the liability of the owner of the vessel, so that the entire subject-matter may be fully and finally adjudicated in one proceeding. *Providence & N. Y. S. S. Co. v. Hill Manufacturing Co.*, 109 U. S. 578, 601." In the case last cited, Mr. Justice Bradley, delivering the opinion of the court, p. 594, says: "In promulgating the rules referred to, this court expressed its deliberate judgment as to the proper mode of proceeding on the part of shipowners for the purpose of having their rights under the act declared and settled by the definitive decree of a competent court, which should be binding on *all parties interested*, and protect the shipowners from being harassed by litigation in other tribunals. Unless some proceeding of this kind were adopted, which should bring *all the parties interested into one litigation, and all the claimants into con-*

*course for a pro rata distribution of the common fund*, it is manifest that in most cases the benefits of the act could never be realized. Cases might occur, it is true, in which the shipowners could avail themselves of those benefits, by way of defense alone, as where both ship and freight are totally lost, so that the owners are relieved from all liability whatever. But even in that case, in the absence of a remedy by which they could obtain a decree of exemption as to all claimants, they would be liable to a diversity of suits, brought perhaps in different states, after long periods of time, when the witnesses have been dispersed, and issuing in contrary results before different tribunals, whilst in the ordinary cases, when a limited liability to some extent exists, but to an amount less than the aggregate claims for damages, so as to require a concourse of claimants and a pro rata distribution, the prosecution of separate suits, if allowed to proceed, would result in a subversion of the whole object and scheme of the statute."

When the owner of the vessel adopts the procedure outlined by the 54th Admiralty Rule, the effect, as stated by Judge Bradley in the case referred to, is to make all persons having claims for damages against the owner of the vessel proper parties to the proceeding. The main question to be decided in the proceeding is whether or not the owner is entitled to limit his liability. If such question is decided in favor of the owner, a decree is entered up compelling all persons having claims for damages to seek satisfaction out of the fund created by the boat, or its value deposited in court. In such a proceeding, a decree in favor of the owner immediately creates a fund in which each of the respondents has an interest, the exact amount of the interest to be determined by the distribution afterwards to be made. As a result of such a decree, each of the respondents immediately loses his cause of action against the owner. As a result, to use the language of the Circuit

Court of Appeals in its first opinion (Record, p. 390): "In every such proceeding all the injured persons have a common interest in the main question as to the right of the owner to limit his liability, and if judgment passes in his favor as to that question, they are all entitled to share in the distribution and the common fund arising from the sale of the vessel or the payment into court of the appraised value thereof; and each person who appears and submits a claim for the court to pass upon has a right to appeal from a decision in favor of the owner." The result of such a common interest upon the right to appeal is then thus stated (Record, p. 390): "The Supreme Court has announced and reiterated several times the rule that separate appeals to the court, by several parties asserting interests in common, affected by a single decree, cannot be permitted, and has enforced the rule by dismissing appeals when necessary parties are not joined, nor barred of their right to appeal by refusing to join after due notice." In support of the principle stated by the court, the following cases are cited:

*Owings v. Kincannon*, 7 Peters, 399.
*Masterson v. Herndon*, 10 Wall. 416.
*Hampton v. Rouse*, 13 Wall. 187.
*Simpson v. Greeley*, 20 Wall. 152.

The very object of the 54th Admiralty Rule of the United States is to try out in a single case the question of the right of the owner to limit his liability. Is it not a perversion of the rule to say, in the event that the shipowner wins, that each one of the respondents has a right to prosecute, in the Appellate Court, a distinct and separate appeal? If the object of the 54th Admiralty Rule is to consolidate all the proceedings in the lower court, it has an equal application to the proceedings in the appellate court. This principle is clearly and distinctly set forth in the first opinion of the Circuit Court of Appeals (Record

p. 390), wherein, commenting upon the effect of the 54th Admiralty Rule upon the proceeding in the lower court, it is said: "For similar reasons when an appeal is taken, it is essential to the jurisdiction of the appellate court that each party having a right to be heard upon the review of the case should be brought before the court or estopped from continuing the litigation."

The object of the appeal was to reverse the decree of the district court, practically enjoining each of the respondents from commencing actions against the railway companies to recover for the damages done by reason of the accident to the barge Columbia. If separate appeals could be taken in a proceeding to limit liability, the Circuit Court of Appeals might, for example, decide against the appellant in the first appeal and afterwards, in a close case, might, by a change in the personnel of the court, decide in favor of the second appellant. Would the first appellant still be enjoined, or would the action of this court upon the second appeal relieve all of the respondents in the proceeding from the operation of the injunction?

The whole policy of this court, as indicated by all of the decisions cited, is to avoid trying any case in fragments on appeal, and the object of the 54th Admiralty Rule is to enable persons situated like the railway companies to try out the entire matter in one proceeding, both in the court below and on appeal.

Upon the question as to the nature of this suit and of the original decree, the second opinion of the Circuit Court of Appeals upon the first appeal and the opinion upon the second appeal are inconsistent with each other. In the opinion first mentioned (Record, p. 401), it was held that the object of the suit was to establish the personal liability of the railway companies towards each of the respondents.

Upon the second appeal, however, the Circuit Court of Appeals held that the object of the suit was not to estab-

lish personal liability against these appellants and that the proceeding from the first had been "a suit in equity in admiralty, not to subject property to liens nor to obtain a personal decree against owners of property." (Record, p. 578.) The court therefore held that the proceeding should not terminate in personal decrees against the railway company, but that the fund (the Ocklahama), in which all the respondents had a common interest, should be brought into court. It was further held that neither Balfour, Guthrie & Co. nor these appellants could object to the allowance made to Anderson and Short because no appeal had been taken by any person as to that portion of the original decree of the district court establishing liability in favor of Anderson and Short. (Record, p. 580.) Does not the opinion of the Circuit Court of Appeals upon the second appeal show clearly that the first appeal was an appeal from a decree to the effect that these appellants might by the surrender of the Columbia limit their liability not only as against Balfour, Guthrie & Co., Anderson and Short, but as against the whole world; and that the appeal was taken solely for the purpose of reversing such a decree jointly affecting all of the present respondents?

Our view of the nature of these proceedings and of the original decree rendered by the district court may possibly be made plainer by an illustration. Assume that William Boyce, who commenced his action against these appellants in the state court of Oregon (Record, p. 3), had not appeared in the proceedings to limit liability instituted by these appellants. As a result of the issuance of the order (Record, p. 12), Boyce was temporarily enjoined from proceeding in his suit in the state court. As a result of the original decree of the district court limiting liability, Boyce was, so long as that decree stood, permanently enjoined. An appeal is taken by Balfour, Guthrie & Co., Anderson and Short, and the first decree is reversed. These

appellants do not surrender the Ocklahama and the district court is unable to seize her. Under these circumstances would Boyce have been enjoined from further prosecuting his action in the state court? Was Boyce not at all times interested in the proceedings to limit liability, although not a party thereto; was he not interested in common with Balfour, Guthrie & Co. in preventing liability from being limited; was he not bound by the decree entered against Balfour, Guthrie & Co. and affected thereby to the same extent and in the same way as those respondents; was he not benefited by the success attending their appeal? In the present case, Anna C. Larson was a party to the original decree of the district court and never appealed therefrom. When that original decree was reversed Mrs. Larson by her counsel went on with the litigation just as though she had appealed and was properly regarded by the district court as not being bound by this original decree. What reversed that original decree as to Larson? If anything it must have been the appeal taken not by her but by the other respondents from the decree affecting the rights of all of the respondents in the same way and to the same extent.

In the opinion of the Circuit Court of Appeals upon the first appeal (Record, pp. 401, 403), reference is made to Oliver v. Alexander, 6 Peck, 143, and to Thomas v. Lane, 2 Sumner, 6. The first case related to the joinder in admiralty of distinct causes of action on the part of seamen to recover wages, and the second case related to the joinder in salvage cases. The very quotations made by the Circuit Court of Appeals from the opinions in the cases mentioned show that the original decree of the district court in the present case was a joint decree from which a joint appeal should have been taken. The following quotation is made from Oliver v. Alexander (Record, p. 402):

"But, although the libel is thus in form joint, the con-

tract is always treated in the admiralty, according to the truth of the case, as a several and distinct contract with each seaman. Each is to stand or fall by the merits of his own claim, and is unaffected by those of his colibelants. The defense which is good against one seaman may be wholly inapplicable to another. One may have been paid, another may not have performed the service, and another may have forfeited, in whole or in part, his claim to wages. But no decree whatsoever which is made in regard to such claim can possibly avail to the prejudice of the merits of others which do not fall within the same predicament; and wherever, from the nature of the defense, it is inapplicable to the whole crew, the answer invariably contains separate averments and is applied to each claim according to its own peculiar circumstances."

In a proceeding to limit liability each respondent so far as the limitation of liability is concerned does not stand or fall by himself; but the owner of the vessel is either entitled to limit as to all or is not entitled to limit as to any; and the final decree, as in the present case, is a decree which enjoins all of the respondents or else leaves them free to proceed as they may be advised.

The very object of the proceeding to limit liability is to bring all of the parties injured into one suit and decide once and for all the question whether or not the owner of the vessel is entitled to limit liability.

The Circuit Court of Appeals (Record, p. 403), quotes the following from Thomas v. Lane: "In case of an appeal from a joint decree in chancery against the defendants in the suit all of the defendants affected by the decree must join, but this is because they are united in interest."

A proceeding to limit liability is an equitable proceeding for the purpose of obtaining an injunction restraining all persons from commencing actions against the owner of the vessel.

In re Morrison, 147 U. S. 34.

The Circuit Court of Appeals in its second opinion (Record, p. 578), states that the proceeding is a suit in equity for the purpose of adjusting all claims, and that as a result of the institution of the proceedings all suits were stayed and every person enjoined. The appellants sought an injunction against the whole world and obtained it by the original decree of the district court. Whether such injunction was properly obtained depended solely upon whether the accident had happened without the knowledge or privity of the appellants and whether the appellants had surrendered the proper fund. If the injury happend without the knowledge or privity of the owner the injunction is granted. If the contrary fact be found the injunction is refused. All of the persons injured are affected by the decree limiting liability and are bound by the proceedings even though not parties thereto. The decree entered is a decree against or in favor of all the persons injured, and each injured person, although his injury be separate and distinct from that of the others, is affected by the decree in common with every other injured person. All persons injured have an interest in the same question and all are bound by the same decree. Read in this connection the statement of fact in the case of Inglehart v. Stansbury, 151 U. S. 68, and note that while each of the parties thereto held a portion of the land in controversy in a different way and neither was interested in the success of the other, yet that nevertheless the decree was held to be a joint decree for the reason that all of the parties were interested in the same question. The same statement may be made in regard to the facts in the case of Sipperley v. Smith, 155 U. S. 86. So in the present case all of the respondents had a common interest in the question as to whether or not the appellants were entitled to limit their personal liability, all

alike were bound by the original decree and all should have appealed therefrom.

II.

**The Oregon Railway & Navigation Company and the Oregon Short Line and Utah Northern Railway were entitled to limit their personal liability without a surrender of the Ocklahama.**

Section 4283 of the Revised Statutes, limiting the liability of shipowners, reads as follows:

"The liability of the owner of any vessel, for any embezzlement, loss, or destruction, by any person, of any property, goods or merchandise, shipped or put on board of such vessel, or for any loss, damage or injury by collision, or for any act, matter or thing lost, damage or forfeiture done, occasioned or incurred without the privity or knowledge of such owner or owners, shall in no case exceed the amount or value of the interest of such owner in such vessel and her freight then pending."

This section is clearly and positively to the effect that the liability of the owner of any vessel for the destruction by any person of any property shipped or put on board of such vessel, without the knowledge or privity of such owner or owners, shall in no case exceed the amount or value of the interest of such owner in such vessel and her freight then pending. The wheat of Balfour, Guthrie & Co. was placed on board of the barge Columbia and a contract of affreightment was entered into by the master of the barge Columbia on behalf of the said barge, for the transportation of such wheat. (Allegations of the libel, Record, p. 5, not denied by the answers; opinion of Circuit Court of Appeals, Record, p. 404.) The goods were not shipped on board of the Ocklahama, and there was no contract of affreightment of any kind whatsoever made with or on behalf of the Ocklahama. This proceeding

was commenced for the purpose of limiting the liability of the Oregon Railroad & Navigation Company, and of the Oregon Short Line & Utah Northern Railway Company, as the owner and lessee of the barge Columbia, for the loss and destruction of the goods shipped on board of the said barge and for no other purpose.

As stated in the opinion of the Circuit Court of Appeals (Record, p. 404), the principal reasons assigned by the respondents against allowing the Oregon Short Line & Utah Northern Railway Company and the Oregon Railway & Navigation Company to limit their liability to the value of the barge, were, first, that the Columbia was, from the inception of the voyage, unseaworthy; and, second, that the Columbia and the tug were, in law, one vessel; and that, in order to avail themselves of the benefit of the limited liability act, the owners must surrender the Ocklahama as well as the Columbia in satisfaction of the loss and damage complained of. Upon the question of the seaworthiness of the barge and the cause of the accident, the district court in its decree made the following findings of fact (Record, p. 84):

"First—That on October 21, 1892, the barge Columbia, being loaded with 8,808 sacks of wheat on her deck, owned by the respondents, Balfour, Guthrie & Co., was taken in tow by the steamer Ocklahama at Portland, Oregon, and by her towed to Astoria, Oregon, said barge and steamer being owned by the petitioners herein.

"Second—That said barge and steamer arrived in safety at Astoria during the night of said October 21, but that in making a landing the stem of said barge struck a floating pontoon, which was kept next the wharf as a fender, with such force as to cause said barge to spring a leak. That said leak was not considered serious or dangerous by those in charge of the said barge, and was not serious or dangerous.

"Third—That said barge, about half an hour after striking said pontoon, was moved to a position behind said wharf, where she rested on the bottom of the Columbia river, which was there composed of soft mud, and being listed against the dock was in a safe position.

"Fourth—That Marshall Short, master of said Ocklahama, and Gus Peterson, one of the crew of said Ocklahama, thereupon descended into the hold of said barge for the purpose of building a bulkhead to stop said leak, and at the same time John Ferguson, master of said barge, was assisting in pumping the water out of said barge by means of a siphon, the lower end of which rested in the bottom of said barge on the side away from the dock.

"Fifth—That after the said barge had rested in this position against the dock *for about an hour and a half*, and while said Short and Peterson were in the hold of said barge, said John Ferguson on his own motion negligently caused the cargo on the deck of said barge to be shifted until said barge was on an even keel and was no longer resting against the dock. At this time, and for some time prior thereto, the tide in the Columbia river was ebbing.

"Sixth—That when said barge came to an even keel she remained in that position for a short time, when, the tide having ebbed and she having no lateral support, said barge keeled over away from said dock, striking her bilge on the bottom of said river with great force, causing the cargo to shift and carry away the deckhouse, and a large portion of said cargo slid into said river, and the hull of said barge was broken down by the shock.

"Seventh—That said Short and Peterson were unable to escape from the hold of said barge, and were drowned, and said William Boyce, who was in the hold of said barge, was injured by being struck by said cargo in attempting to reach the deck of said barge.

"Eighth—That said barge was seaworthy, and was at

the time of the voyage in a suitable and proper condition for the purpose for which she was being used; that she was properly manned and was not overloaded, *and that the said leak caused by striking the dock was not serious or dangerous; that the position in which she was placed against the side of the dock was a proper and safe position, and that the accident was caused by the negligent shifting of the cargo on said barge by the said Ferguson* and the collapse was due to the exceptional strain to which the timbers were subjected in the unnatural position in which she was placed when thrown upon her side, and that the steamer Ocklahama did not in any way cause the said accident.

"Ninth—That John Ferguson, the master of the said barge, was a licensed mate upon the Columbia river, and there was no negligence on the part of the petitioners or either of them in employing the said John Ferguson; that the said John Ferguson occupied no position with either of the petitioners herein except that of captain of the said barge; that the said accident resulting in the death of Short and Peterson and injuries to Boyce and the loss of the wheat loaded on the said barge occurred without the knowledge or privity of said petitioners or either of them."

The district court, in the opinion delivered (Record, p. 89), held that the Ocklahama and the Columbia were not within the meaning of the limited liability act one vessel, and, having held, as stated in the eighth finding of fact contained in the decree, that the Ocklahama did not, in any way, cause the accident, it was therefore decreed that the railway companies could limit their liability to the value of the Columbia.

All of the findings of fact made by the district court were sustained by the Circuit Court of Appeals, and were accepted by the Circuit Court of Appeals as conclusive (Record, p. 404), and the decree of the district court was

reversed solely because the Circuit Court of Appeals was of the opinion that the Ocklahama and the Columbia constituted, for the purposes of the voyage, one vessel; that both of said vessels were pledged for the faithful performance of the contract entered into by the officers of the Columbia with Balfour, Guthrie & Co. for the transportation of their wheat; that it was immaterial whether the officers of the Columbia or of the Ocklahama made the contract of carriage, or whether the negligence of the captain of the Columbia alone caused the accident, and that no limitation of liability could be obtained without the surrender of both the Columbia and Ocklahama. In the opinion of the Circuit Court of Appeals (Record, pp. 404-406), it is said:

"All of the respondents and cross-libellants not only contended that the barge was, from the inception of the voyage, unseaworthy, but also, that the barge and tug were, in law, one vessel, and that, to avail themselves of the benefit of the limited liability act, the owners must surrender the tug as well as the barge in satisfaction of the loss and damage complained of. The court below found the fact to be that the barge was, at the time of the accident, seaworthy, and, as the evidence in respect to that question is decidedly conflicting, the finding of the trial court must be accepted on this appeal as conclusive. The Alejandro, 6 C. C. A., 54; 56 Fed. 621. The court below also found that the master of the barge was negligent in shifting certain portions of her cargo, and that this negligence of the master of the barge was the proximate cause of the sinking of the barge, and of the loss and injuries sustained by the respective claimants, and, holding, as it did, that 'the tow service of the tug was ended before the proximate cause of the accident was set in motion,' confined the compensation of the respective claimants to the stipulated value of the barge. In this we think the court below was in error.

"The case shows that the wheat in question was destined to be transported from Portland, Oregon, to Liverpool, England, by means of the barge Columbia and the British ship Westgate. That fact appears, not only from the testimony in the case, but from the petition as well. The Oregon Short Line & Utah Northern Railway Company, lessee of the barge and of the tug Ocklahama, undertook to transport the wheat from Portland to the ship Westgate. The shipping receipt issued by the master of the barge to the owner of the wheat was issued on behalf of the owner of the craft. The contract of carriage was the owner's contract, and the terms of the contract were that the carrier was only to be liable to the owner of the cargo for negligence. According to the contract, the carrier was liable for negligence. As the wheat was to be carried on board the barge, which had no motive power, of necessity such power had to be supplied by the carrier. This the carrier did, as was its custom, by means of a tug—in this instance the tug Ocklahama, owned by the Oregon Railway & Navigation Company, and under lease to the Oregon Short Line & Utah Northern Railway Company, as was the barge Columbia. When the tug made fast and took in tow the barge, to perform the contract of carriage, the two became one vessel for the purpose of that voyage—as much so as if she had been taken bodily on board the tug, instead of being made fast thereto by means of lines. The Northern Belle, 9 Wall. 526-29; Sturgis v. Boyer, 24 How. 10-122; The Merrimac, 2 Sawy. 595, Fed. Cas. No. 9,478; The Bordentown, 40 Fed. 686. . . .

"In the present case, the barge and tug had the same owner, and both were operated by the same carrier. In the voyage both were necessarily under the control of the master of the tug. They constituted the instrument of carriage, to which the wheat was liable for the service, and on which the owners of the cargo had a lien for the due

performance of the contract of carriage. The case shows that the tug, having the barge loaded with wheat in tow, left Portland about 1 o'clock in the afternoon of October 21, 1892, and reached Astoria about 12 o'clock that night. Notwithstanding there is nothing in the case to show that the contract of carriage contemplated the landing of the wheat at Astoria, or the tying up of the barge at the dock at that place, but, on the contrary, the delivery of the wheat from the barge to the ship Westgate, yet the tug—due, probably, to the late hour of arrival—undertook to tie up at the dock, and, in doing so, carelessly ran the barge against the piles of the dock, and with such force as to knock a hole in her stem, thereby causing a serious leak. The master of the tug continued, after the accident, to exercise control over the barge, as well as the tug, changed its position, put the engineer of the tug at work with a siphon to pump the water out of the barge, and himself went, with one of the deckhands of the tug, into the hold of the barge for the purpose of building a bulkhead to guard against the water, and was so engaged when, about two hours after the accident, the barge collapsed, causing the death of the master and deckhand of the tug, the injury of Boyce, the deckhand of the barge, and the loss of the wheat to Balfour, Guthrie & Co.

"The court below held that the collapsing of the barge was occasioned by the negligent shifting of some sacks of wheat by the master of the barge, and that that act of his was the proximate cause of the loss and damage in question. But no question of proximate cause, we think, arises in the case, for the reason that the tug and barge are, in law, considered one vessel, for the purpose of the voyage in question, and whether the accident giving rise to the loss and damage be directly attributable to the acts of the master of the barge or to those of the master of the tug, it is equally the negligence of the carrier, for which it contracted to be liable. It results that, in according the peti-

tioners a limitation of liability without the surrender of the tug Ocklahama, the court below was in error."

Upon this branch of the case is raised the question as to what constitutes the "vessel" to be surrendered mentioned in the limited liability act; and also the question whether a tug is subject to a lien arising out of the contract of affreightment made by her tow in a case where the fault was committed by those in charge of the tow, and the tug was without fault. Upon these questions the position taken by the Circuit Court of Appeals is not sound as a matter of law. The two vessels are separate and distinct. Each has its owner, its general creditors and its lienors. Each may be separately sold to a *bona fide* purchaser. Each is subject to separate and distinct liens arising as a result of maritime contracts made on behalf of the vessel or of maritime torts committed by it. Maritime liens cannot be extended by construction, analogy or inference. This principle and the nature of a maritime lien is clearly stated in the case of *Vandewater v. Mills*, 19 How. 89, as follows:

"The maritime 'privilege,' or lien, is adopted from the civil law, and imports a tacit hypothecation of the subject of it. It is a '*jus in re*,' without actual possession or any right of possession. It accompanies the property into the hands of a *bona fide* purchaser. It can be executed and divested only by a proceeding *in rem*. This sort of proceeding against personal property is unknown to the common law, and is peculiar to the process of courts of admiralty. The foreign and other attachments of property in the state courts, though by analogy loosely termed proceedings *in rem*, are evidently not within the category. But this privilege or lien, though adhering to the vessel, is a secret one; it may operate to the prejudice of general creditors and purchasers without notice; it is, therefore, '*stricti juris*,' and cannot be extended by construction, analogy or inference. 'Analogy,' says Pardessus (Droit Civ., Vol. 3, p. 597), 'cannot afford a decisive argument,

because privileges are of strict right.' They are an exception to the rule by which all creditors have equal rights in the property of their debtor, and an exception should be declared and described in express words; we cannot arrive at it by reasoning from one case to another."

The law creates no lien on a vessel as a security for the performance of contract to transport a cargo until some lawful contract of affreightment is made and the cargo is shipped under it.

*The Freeman v. Buckingham*, 18 Howard, 388.

*Vandewater v. Mills*, 19 How. 89.

*The Keokuk*, 9 Wallace, 517.

In the present case the contract of affreightment was made by the master of the barge Columbia, and the shipping receipt was issued by said master on behalf of the barge. Such a contract of affreightment could create no lien against the Ocklahama. The Ocklahama, if negligent in towing the barge, might, as a result of such tort, become subject to a lien in favor of the barge or its cargo, but cannot be made subject to a lien in favor of the cargo of the Columbia as a result of the contract of affreightment made on behalf of the Columbia. It cannot be said that because a tugboat assists in towing a vessel, such tugboat becomes, as a result of such act, subject to a lien for the performance of all of the contracts of affreightment entered into by the vessel in respect to the freight shipped thereon.

It is undoubtedly true that it is not absolutely necessary that the merchandise received under a contract of affreightment shall actually be physically placed in the vessel.

*Buckley v. Naumkaeg Company*, 24 Howard, 386.

It is stated by this court in that opinion (p. 389), that the "condition of the Bay of Mobile, which is somewhat peculiar, because material to the proper understanding of the question in this case." It is then stated that vessels of large size and drawing over a given depth of water cannot pass the bar in the bay, which is situated a considerable

distance below the city, and that the cargo of such vessels is brought to them in lighters from the city over the bar and then laden on board the vessel. It is stated (p. 389) that from the agreed statement of facts it appears that the master of the vessel then lying at the Port of Mobile agreed to carry for the libellant 770 bales of cotton from that port to Boston. The custom of the port was shown in evidence, and it was held that the delivery to a lighterman as the agent of the ship was a delivery to the master of a ship, so as to render the ship liable for the performance of the contract of affreightment. It will be noted that a contract of affreightment was actually entered into on the part of the ship, and the only question involved in the case was as to what constituted a delivery. The opinion nowhere states, however, that a delivery to the lighter without a contract on the part of the ship would render the ship liable for the acts of the lighter.

Any such result is contrary to the principles stated in The Keokuk, 9 Wallace, 517. In that case it is clearly held that the law creates no maritime lien on a vessel as security for the performance of a contract to transport a cargo unless some contract of affreightment has been made, and that, under the fact, no contract was shown, and hence the Keokuk was not liable for the loss of the grain on the barge.

The Keokuk, supra, and the Northern Belle, 9 Wallace, 522, show the manner of handling grain in bulk upon the Western rivers. Barges are left at various places along the river to be loaded by the shippers with grain in bulk delivered from elevators. (9 Wall. 528.) During the time of loading, the barge is under the control of the shipper, and is simply a receptacle into which the grain may be placed. From time to time, steamboats arrive, make contracts for the carriage of the grain, and convey the grain to its destination. When contracts of affreightment are made by the steamer, then on the principle established in

the case of ***Buckley v. Naumkaeg***, 24 Howard, 386, the steamer becomes responsible for the safe delivery of the grain and becomes subject to a lien for any breach of the contract of affreightment.

In the present case, the contract of affreightment was made with the barge Columbia, and no contract of any kind whatsoever for the carriage of the goods was made for or on behalf of the Ocklahama. It is true that both boats were owned by the Oregon Railway & Navigation Company; but it is equally true that the Farmers' Loan & Trust Company had an interest in the Ocklahama, which can only be divested as the result of a maritime lien against that vessel.

This court has directly held, in the case of the J. P. Donaldson, 167 U. S. 599, 603, that a tug towing a barge is not liable as an insurer to the cargoes on board the barge, and that the owners of the barge or the cargoes could not maintain any action for the loss of either against the tug or her owners, without proving negligence on the part of the tug.

Under the decision in J. P. Donaldson, ***supra***, the Ocklahama could only be held liable as a result of a tort committed by the Ocklahama. The court below found that no such tort had been committed by the Ocklahama, and hence it follows that there is no lien against that vessel.

In the case of Sturges v. Boyer, 24 How. 110, a tug towing a ship was alone held liable for a collision to a third vessel. That result was reached for the reason that the fault causing the collision was committed by the tug alone, and the reasoning of the court on page 122 clearly shows that in cases where the tow alone was in fault the tug would not be subject to any lien.

The decision in The Bordentown, 40 Federal Reporter, 687, is clearly against the position taken by the Circuit Court of Appeals, and holds that, no matter how many

9733



boats owned by the same person may be engaged in the performance of the same service or contract, the owner may limit his liability by a surrender of the boat or boats at fault, and need not surrender the others. The Pennsylvania Railroad Company, the owner of three tugs, The Bordentown, The Winnie and The Willie, engaged to take a fleet of canal-boats or barges from South Amboy to the sea fence in Brooklyn. The tow left South Amboy in charge of The Winnie and The Willie. Soon after leaving South Amboy the tow was joined by The Bordentown, which boat took charge of the fleet. The Willie detached a portion of the tow and landed it safely at the Standard Oil Company's dock near Port Johnson, and The Bordentown and The Winnie proceeded with the tow. After passing the mouth of the Kills and entering the bay, the water was found to be very rough, and it was deemed unsafe to proceed to the sea fence at Brooklyn on account of the direction of the wind making that place unsafe to moor the tow. The tow then proceeded in the direction of the American docks, but after going in this direction for a time the wind shifted so as to render these docks an unsafe mooring place. The fleet was then headed in the direction of the Kills, but had not gone far in this direction when it was joined by The Willie, whose captain had come from Port Johnson after having landed his detachment of the tow at that point, to render any assistance to The Bordentown that might be needed (p. 685). The captain of The Willie reported that the water was very rough at the mouth of the Kills, and the pilot of The Bordentown determined again to cross the bay to Brooklyn. After having proceeded in this direction for a distance, the Hughes, the port hawser boat, sunk on account of filling with water, and parted the port hawser. The tow then got loose from the tugs and pounded each other in the open sea, and many of the boats were lost. The Winnie rescued one boat and The Willie two others. The railroad

company offered to surrender the three boats. It was held that the fault was committed in undertaking to cross the bay, and that as The Willie was not present at the time the first attempt was made, she need not be surrendered. It will be noted, however, that The Willie started with the tow and afterwards returned to it to render any service needed, and was at all times performing some service in connection with the tow. On the theory of the Circuit Court of Appeals, she was pledged to the performance of the work, and must therefore be surrendered. She was held, however, not to be a party to the fault, and, therefore, need not be surrendered. This decision clearly shows that the negligent vessel, or vessels, alone, need be surrendered, and not all of the vessels owned by a common master engaged in the same service.

Furthermore, no offer has been made in the present case to surrender the Ocklahama. The object of the petition was to limit the liability of the owners of the Columbia for the loss and damage inflicted by her. If the Ocklahama committed any wrong, the appellants have a lien upon that boat, and can proceed against her, if they be so advised. All the vessels engaged in the common fault need not be surrendered in order to limit the liability of the owners of any particular boat engaged in the fault. This is clear from the language of Section 4283 of the Revised Statutes, and of the amendment of June 26, 1884 (23d Statutes at Large, 57). The individual liability of each owner is limited to the value of his interest in the boat, to be ascertained in the manner provided by the amendment. The point raised was directly presented to Judge Benedict, in re Myers Excursion & Navigation Company, 57 Fed. Rep. 240. The facts in this case will be found stated by the learned judge commencing on page 241. The barge Republic was hired under a contract to take an excursion party to Cold Spring Grove and back to New York. The barge in pursuance of that contract took on

board the excursion party and was towed to Cold Spring Grove by the steamer Crystal Stream, owned by the same persons. Early in the afternoon the barge reached a wharf on the east side of the harbor at Cold Spring, where she was made fast to the end of the wharf, the port side of the barge being next to the wharf and the Crystal Stream being fast to her on her starboard side. Just as the barge was about to leave the wharf on the return trip, the excursionists being on board but the lines not cast off, a thunder storm came up from the westward, striking the barge on her starboard side. By the force of the wind the roof on the hurricane deck on the starboard side was raised off its fastenings and doubled over against the two masts of the barge and the pilot-house. The pilot-house turned over, the two masts broke, and these masts, together with the broken portion of the hurricane deck fell upon the other side of the hurricane deck, which was thereby crushed down upon the passengers underneath it, and thirteen of the passengers were in this way killed. The owners of the barge being sued for the injuries to these passengers, filed their petition and surrendered the barge to the custody of the court. It was claimed that the petitioners were not entitled to the relief sought, for the reason that the tug Crystal Stream had not been surrendered. Judge Benedict disposes of this objection as follows (p. 241): "The next objection taken is, that the tug Crystal Stream, being the motive power of the barge Republic, should also have been surrendered. This objection is without foundation. The petitioners do not seek to limit any liability they may be under as owners of the Crystal Stream, and there is nothing in this proceeding to prevent the parties injured from proceeding against the Crystal Stream or her owners, if so advised."

III.

**The district court had no jurisdiction to make any decree for damages against either the Oregon Railway & Navigation Company or the Oregon Short Line and Utah Northern Railway Company, or to seize the Ocklahama.**

In view of the nature of this proceeding, the only decree which could have been entered in the district court upon the mandate of the Circuit Court of Appeals was one dissolving the injunction restraining the respondents from pursuing appropriate remedies to collect the damages claimed to have been suffered by them, and the district court had no power to retain jurisdiction of the proceeding for the purpose of entering a judgment against the railway companies, or either of them, for damages.

That this position is correct is clearly shown by the history of the limited liability act and the procedure which has grown up under it. The proper method of obtaining the limitation of liability is not pointed out by the Revised Statutes, although Section 4283 provides that it shall be deemed sufficient compliance on the part of such owner if he transfers his interest in such vessel or freight for the benefit of such claimants to a trustee to be appointed by any court of competent jurisdiction.

Under this act no special proceeding to limit liability need be instituted, but the benefit of the act may be obtained by claiming such benefit in any proceeding instituted either against the owner of the vessel or against the vessel itself.

In The Manitoba, 122 U. S. 97, the benefit of the act was claimed in a libel in rem against the vessel by filing a petition in the proceeding in rem.

In The Scotland, 105 U. S. 24, the benefit of the act was obtained by pleading it in the answer to a libel in personam against the owner of the vessel.

In Craig v. Continental Insurance Company, 141 U. S.

638, the benefit of the act was claimed in an answer filed in an action at law.

The benefit of the act need not be claimed at any particular time, but the owner of the vessel can wait until judgment has gone against him.

The Benefactor, 103 U. S. 239.

Where the right to limit liability is claimed in a suit brought by a particular claimant, the result might be that the owner of a ship would be required to pay out as the result of the aggregate amount of several judgments entered in different suits more than the value of the vessel For the purpose of preventing any such result, this court, as the result of the decision in the case of Norwich Co. v. Wright, 13 Wallace, 104, 125, prepared and announced Admiralty Rules 54 to 57 inclusive. Those rules authorize the institution of a proceeding by the owner of a vessel for the purpose of obtaining a decree against all persons injured by the vessel, restraining such persons from commencing or further prosecuting any suits against the owner to enforce personal liability. The proceeding under those rules is an equitable action, having for its purpose the obtaining of an injunction.

In re Morrison, 147 U. S. 14, 34.

In the proceeding authorized by the 54th Admiralty Rule, the petitioners seek to limit their liability and obtain the consequent injunction enjoining all persons from instituting any suit or proceeding to establish personal liability against the petitioners; and the claimants resist the right to limit, and seek to have the injunction dissolved.

The present proceeding being an equitable proceeding for the purpose of obtaining an injunction, the result is that if the railway companies had been successful the injunction should have been granted. The railway companies being unsuccessful, then the injunction granted on the commencement of the proceeding should have been dissolved and the proceeding should have been dismissed.

In re Myers Excursion & Navigation Company, 57 Fed. Rep. 240, a petition to limit liability was filed for injury done by a barge. The case was tried before Judge Benedict, and he held that the cause of the injury was within the knowledge and privity of the owner, and that therefore the owner was not entitled to limit liability. The closing words in the opinion of this distinguished admiralty judge show what the practice should be in such cases: "My decision, therefore, is that the petition should be dismissed and the injunction dissolved."

It is a familiar principle that a court of equity has no power to enter a decree for damages except as an incident to the granting of some equitable relief, and where the relief is withheld, damages cannot be granted, no matter what view the court may take of the rights of the parties.

Pomeroy's Equity, Second Edition, Sec. 178.

Buzzard v. Houston, 119 U. S. 352.

Storey's Equity Jurisprudence, Sec. 794.

Beach's Equity Jurisprudence, Sec. 3.

A court of equity has undoubted jurisdiction to entertain a suit to enjoin an action at law, and when the conclusion is reached that such injunction should be granted, the court of equity has power to hear and determine all questions of fact existing between the parties.

Pomeroy's Equity Jurisprudence, 2d Edition, Sec 236.

When the conclusion, however, is reached that there is no equity in the bill and that the injunction should be refused, the court of equity would have no right to enter such judgment as it thought should be entered in the law action between the parties. The jurisdiction is invoked for a special purpose. The decision of the court would be binding between the parties as to the right to enjoin the legal action, and such question could not again be raised or litigated; but the jurisdiction of the court to decide between the parties is limited by the purpose for

which such jurisdiction was invoked. This proposition would seem to be too plain to need argument. If it be not correct, then it would follow that the commencement of a suit in equity to enjoin a legal action would immediately transfer to the court of equity jurisdiction over the entire action, although the court should reach the conclusion that the bill was absolutely without equity and should never have been filed. The text of Mr. Pomeroy, to which reference has been made, clearly shows that it is only when the court has jurisdiction to grant the injunction that it has power to go further and decide the whole issue.

In the present case the proceeding was instituted solely for the purpose of determining between all persons interested whether or not the petitioners were entitled to limit their liability, and were therefore entitled to enjoin any and all other suits. The decision of the court upon the right of the petitioners to limit their liability and obtain an injunction is final and binding, but the court having reached the conclusion that no such judgment should be granted, it had no jurisdiction to enter a judgment, even by consent, determining the issues of liability existing between the parties.

If, however, it be considered proper that any decree for damages should be entered, such a decree must in the very nature of things be a personal decree against those seeking to limit their liability. The suit relates solely to personal liability, and is not a suit in rem.

In re Morrison, 147 U. S. 34.

Such a suit ought not to terminate in a decree in rem against a vessel.

At the time the petition initiating this proceeding was filed, the Ocklahama was not surrendered, and no attempt was made by either of the railway companies to limit their liability for any damage done by the Ocklahama. On the contrary, it was constantly claimed that no damage was done by the Ocklahama. If the petitioners did not wish

to limit their liability, if any, arising out of any injuries done by the Ocklahama, the courts below had no power to seize the Ocklahama for the purpose of making the railway companies limit their personal liability. The right to limit liability is one conferred upon owners of vessels to be exercised or not at their pleasure.

The following statement is made in the opinion of the Circuit Court of Appeals (Record, p. 578):

"As the result of filing the petition, all proceedings against the vessels and their owners were stayed."

It is thereupon stated in the opinion that as the result of the personal insolvency of the petitioners, it is equitable that the Farmers' Loan & Trust Company and its successor, the Oregon Railroad & Navigation Company, should be divested of all right and interest in and to the Ocklahama. Where a tort is committed in the operation of a vessel, there immediately arises a personal liability against the owners, and a maritime lien against the vessel itself. Such personal liability can be enforced in any personal action against the owners. The maritime lien against the vessel can be enforced only in a proceeding in rem. The personal liability of the owners may exceed the value of the vessel itself. It therefore follows that after the person injured has exhausted his remedy against the vessel to the extent of its value, such injured person still has a personal action against the owner for the remainder of the damages suffered. The primary and only object of a proceeding like the present is to cut off any right to recover any amount in excess of the value of the vessel itself. This limitation can be obtained by either conveying the vessel to a trustee for the benefit of the injured person, or by giving a bond representing the value of such vessel. When the vessel or her value has been placed in the hands of the court, thus giving to the injured person every benefit which might be derived from an action *in rem* against the vessel itself, it follows that not only are personal actions

against the owner stayed, but also the proceeding *in rem* against the vessel. The stay against the vessel takes effect not by reason of the form of the order staying the personal liability, but from the fact that the injured person has the full benefit of the value of the vessel as the result of her value being placed in the hands of the court.

In the present proceeding, the Oregon Railway & Navigation Company did not surrender the Ocklahama or give any bond for her value. The petition filed instituting the proceeding (Record, p. 6) did not pray that any order be granted restraining any suits against the Ocklahama, but prayed only that an order might be made restraining the prosecution of suits against the petitioners. The order of injunction (Record, p. 13) did not restrain any person whomsoever from prosecuting any maritime lien of any kind whatsoever against the Ocklahama, but only restrained the prosecution of suits and actions against the Oregon Railway & Navigation Company and the Oregon Short Line & Utah Northern Railway Company. In the absence of the surrender of the Ocklahama, no order could or would have been made restraining suits against the Ocklahama itself. There therefore never has been a day from the happening of the accident to the present time when any person having any maritime lien against the Ocklahama could not have undertaken to have asserted such lien by an appropriate proceeding *in rem*.

Even if an order had been made restraining suits against the Ocklahama, it would have been the duty of the respondents to have called the attention of the court to the fact that the Ocklahama had not been surrendered, and it would have followed as a matter of course that the injunction would have been modified. The real fact is that until the Oregon Short Line & Utah Northern Railway Company became insolvent, the respondents wished to realize the full amount of their claims, considerably in excess of the value of the Ocklahama, and were willing

to rely upon the solvency of the Oregon Short Line & Utah Northern Railway Company, and it was only after the Oregon Short Line & Utah Northern Railway Company became insolvent that the respondents have undertaken to twist this proceeding into one *in rem* against the Ocklahama.

The fact that the Oregon Short Line & Utah Northern Railway Company and the Oregon Railway & Navigation Company have become insolvent during the litigation does not create any equity in favor of the respondents. Such insolvency might naturally have occurred in the course of any ordinary personal litigation. Such insolvency did occur in the case of the Northern Pacific Railway Company during the prosecution of the suits terminating in the judgments in favor of the claimants in the following cases:

The Farmers' Loan & Trust Co. v. Northern Pacific R. R., 79 Fed. Rep. 227.

The Northern Pac. R. R. Co. v. Hefflin, 83 Fed. Rep. 93.

The Farmers' Loan & Trust Co. v. Longworth, 83 Fed. Rep. 336.

The Farmers' Loan & Trust Co. v. Nestelle, 79 Fed. Rep. 748.

The causes of action out of which the judgments against the Northern Pacific referred to arose are certainly as meritorious, from an equitable standpoint, as that of Balfour, Guthrie & Co., and yet in the cases just cited the Circuit Court of Appeals for the Ninth Circuit held that the mortgage upon the railroad property was superior to the equities of the judgment creditors. The only difference between the cases referred to and the present one is that as the result of the happening of the accident a maritime lien may have arisen in favor of Balfour, Guthrie & Co. against the Ocklahama; but such maritime lien has never been undertaken to be asserted in any appropriate

proceeding. Certainly no reason of an equitable nature exists whereby the Farmers' Loan & Trust Company and its successor in interest, the Oregon Railroad & Navigation Company, should be deprived of the value of the Ocklahama for the benefit of the respondents.

The courts below had power to declare that the railway companies had no right to limit their liability, but had no power to undertake to make them do so.

The question of the proper procedure discussed in this point is one which will arise in every case where the decision of the court is against the right to limit; and the only other case which we have found involving the same matter is the case referred to, decided by Judge Benedict.

In re Myers Excursion & Navigation Co., 57 Fed. Rep. 240.

The action taken therein is not in harmony with the action taken in this cause.

IV.

**The Oregon Railway & Navigation Company was not liable to either of the respondents.**

It is alleged in the second article of the original petition to limit liability (Record, p. 2) that the Oregon Short Line & Utah Northern Railway Company was at the time of the accident the lessee from the Oregon Railway & Navigation Company of the barge Columbia, and was at all times operating the said barge Columbia, and had the sole and exclusive possession, charge, control and management of the said barge. This article is admitted by the answer of Balfour, Guthrie & Co. (Record, p. 17), by the answer of Malvina Short (Record, p. 28), and by the answer of Sven Anderson (Record, p. 33). The fourth article of the answer of Malvina Short (Record, p. 31), alleges that Marshall B. Short, at the time of the accident, was in the employment of the Oregon Short Line & Utah Northern Railway Company. The answer of Sven Anderson (Record, p. 35) alleges that John August Peterson

was at the time of the accident in the employment of the Oregon Short Line & Utah Northern Railway Company.

Under these circumstances, it appears from the pleadings themselves that the barge Columbia and the steamer Ocklahama were solely and exclusively operated at the time of the alleged injuries by the Orgon Short Line & Utah Northern Railway Company, and that the Oregon Railway & Navigation Company had no interest of any kind whatsoever in the operation of either of the said vessels.

It was found as a fact by the district court below that the barge Columbia at the time of the accident was seaworthy, and this finding was sustained by the circuit court of appeals (Record, p. 404). Under these circumstances, the Oregon Railway & Navigation Company was not and could not be held personally liable to any extent whatsoever to either of the claimants, and the decree of the district court upon the mandate should have so found. Instead of so finding, the final decree provides (Record, p. 515) that upon the payment of the sum of $8,600 the petition for a limitation of liability of the petitioners will be allowed, and thereby implies that until said sum is paid the Oregon Railway & Navigation company is liable to the respondents.

No finding was made by the original decree of the district court to the effect that the Oregon Railway & Navigation Company was liable, save and except to the extent of its interest in the Columbia. The portion of the final decree imposing full liability, affirmed by the circuit court of appeals, is in conflict with the well-settled rule that no finding of fact can be made contrary to admissions made by the pleadings.

For the reasons stated, the decree of the circuit court of appeals should be reversed.

W. W. COTTON,
For Appellants.

A. B. BROWNE,
Of Counsel.

No. 73 and 74.

Br. of Cotton & Browne for Appt

Office Supreme Court U.S.
FILED
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JAMES H. MCKENNEY,
Clerk.

IN THE

# SUPREME COURT

Filed Oct. 6, 1900.

OF THE

## UNITED STATES

OCTOBER TERM, ~~1899.~~ 1900

THE OREGON RAILROAD & NAVIGATION COMPANY, *Appellant*,

*v.*

ROBERT BALFOUR, *et. al.*, partners doing business as BALFOUR, GUTHRIE & Co., *et. al.*, *Appellees.*

THE OREGON RAILWAY & NAVIGATION COMPANY, and THE OREGON SHORT LINE & UTAH NORTHERN RAILWAY COMPANY, *Appellants*,

*v.*

ROBERT BALFOUR, *et. al.*, partners doing business as BALFOUR, GUTHRIE & Co., *et. al.*, *Appellees.*

NOS. ~~313~~ 73 AND ~~314~~ 74

*Appeal from the United States Circuit Court of Appeals for the Ninth Circuit.*

## Brief of Appellants on Motion to Dismiss the Appeal and Confirm.

W. W. COTTON,
*For Appellants.*

A. B. BROWNE,
*Of Counsel.*

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NOS. 313 AND 314.

*Appeal from the United States Circuit Court of Appeals for the Ninth Circuit.*

## Brief of Appellants on Motion to Dismiss the Appeal and Confirm.

The motion to dismiss the appeals is made upon the ground that this court has no jurisdiction to entertain such appeals. The argument made in the appellees' brief in support of the motion to dismiss is short and is this: A pro-

ceeding to limit liability is an "admiralty case" and therefore, under section 6 of the act establishing the circuit courts of appeals, the decrees of such courts are final.

The material portions of the 6th section of the act referred to are as follows: "The judgments or decrees of the circuit court of appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States or citizens of different states; also in all cases arising under the patent laws, the revenue law and under the criminal laws and in admiralty cases. . . . In all cases not hereinbefore in this section made final there shall be of right an appeal or writ of error or review of the case by the Supreme Court of the United States where the matter in controversy shall exceed $1,000 besides costs."

If a proceeding to limit liability be not an "admiralty case" it is clear that under this statute the appellants have as a matter of right an appeal to this court. A proceeding to limit liability is not an "admiralty case" in any sense of the term. In support of this position the following matters are now suggested and will be hereafter discussed:

First—A proceeding to limit liability is a proceeding created and existing wholly by virtue of statute and is a proceeding never known to courts of admiralty.

Second—A proceeding to limit liability is an equitable proceeding and involves the appointment of a trustee and the granting of injunctions, both preliminary and final; but the district court as a court of admiralty has no equitable powers and exercises no equitable jurisdiction, although the subject be maritime.

Third—Congress had power to create the proceeding to limit liability not because the judicial power of the United States extends to cases of admiralty jurisdiction but because such judicial power extends to cases of maritime jurisdiction. The district courts have jurisdiction over such

proceedings not because such district courts are courts of admiralty but because such courts have jurisdiction over "all causes of maritime jurisdiction."

Fourth—The constitution, in granting judicial power, conferred such power in "cases of admiralty and maritime jurisdiction." By the judiciary act establishing the district courts jurisdiction of such courts extends to all "causes of admiralty and maritime jurisdiction." The rules of this court regulating the exercise of such jurisdiction are "rules of practice for the courts of the United States in admiralty and maritime jurisdiction." The use of both words admiralty and maritime is not mere redundancy, and a meaning must necessarily be attached to both words. In view of the use of both words in the constitution and in the act conferring jurisdiction upon the district court, congress must be presumed by the act of 1891 establishing the circuit courts of appeal to have drawn a distinction between admiralty cases and maritime cases, and a proceeding to limit liability clearly belongs to the latter class.

In support of the assertion that proceedings to limit liability are "admiralty cases" reference is made in the brief of the appellees to several opinions of this court. In all of the cases to which reference is made questions were presented as to the jurisdiction of the district courts over proceedings to limit liability; but no question similar to the one involved in this case was considered or decided. The only possible support which these cases give to the proposition asserted by the appellees is that in the general discussion contained in some of them the words "admiralty courts" or "admiralty jurisdiction" may be found. The history of the act limiting the liability of shipowners appearing in the very cases to which reference is made in the brief of the appellees shows that the expressions quoted were not used in a technical sense but in a general sense and without regard to their exact meaning. A reading of the cases decided by

this court under the limited liability act shows that with at least equal frequency and with much more exactness the rule of limited liability is referred to as a rule of the "maritime" law to be applied in "maritime cases" in the exercise of the "maritime jurisdiction" of the courts. Indeed, the very quotations contained in the brief for the appellees show that the word "maritime" is more frequently used in reference to the rule to the proceedings and to the jurisdiction than is the word "admiralty."

Our view of the proceeding might be supported by numerous quotations from the decisions of this court similar to the following, found in The Scotland, 105 U. S. 31, and quoted in Butler v. Boston Steamship Co., 130 U. S. 556.

"It is enough to say, that the rule of limited responsibility is now our maritime rule. It is the rule by which, through the act of congress, we have announced that we propose to administer justice in maritime cases."

We refrain from making such quotations, for the reason that we feel that the right of appeal in this case should not depend upon mere words used by this court in describing the proceeding, but should and will rest upon broader and higher grounds.

The material portions of the act limiting the liability of shipowners are found in the Revised Statutes, sections 4283, 4284 and 4285. The first section states the rule in broad and general terms that the liability of the owner of any vessel for any act, matter or thing done, occasioned or incurred without the privity or knowledge of such owner shall in no case exceed the amount of the value of the interest of such owner in such vessel and her freight then pending. The other sections provide in substance that the owners of the vessel, or any of them, may take appropriate proceedings in any court for the purpose of apportioning the sum for which the owner of the vessel may be liable among the parties entitled thereto; that it shall be deemed

a sufficient compliance on the part of such owner with the requirements of the act if he shall transfer his interest in such vessel and freight to a trustee to be appointed by any court of competent jurisdiction to act as such trustee for the person who may prove legally entitled thereto; and that from and after such procedure all claims and proceedings against the owner shall cease. This act does two things, namely, first, it establishes a rule limiting the liability of shipowners; and, second, it provides a proceeding which the owner may initiate for the purpose of having a course of all claimants and of limiting once and for all the owner's liability to the value of the vessel.

A distinction is to be noted at the outset between the rule establishing the limitation and the proceeding to be taken by the owner for the purpose of obtaining such a limitation against all persons. The rule limiting the liability of shipowners is applicable to all courts, both state and federal; and the right to the limitation may be set up by the owner as a defense in any form of action in any court.

In the Manitoba, 122 U. S. 97, the limitation was claimed in an answer to a libel in rem against the vessel.

In The Scotland, 105 U. S. 24, the limitation was claimed in an answer to a libel in personam against the owner of the vessel.

In Craig v. Continental Ins. Co., 141 U. S. 638, the limitation was obtained in an answer filed in an action at law.

The proceeding to be instituted by the owner for the purpose of obtaining a general limitation of liability stands by itself as one distinct from any other proceeding known to any court of law, of equity or of admiralty.

During the course of the proceeding, the district court appoints a trustee whose acts it must control and govern. When the proceeding is commenced, the petitioner may apply for and obtain an injunction against the prosecution of all actions against him (Rule 54), and if the owner be

entitled to the limitation, the final result is a decree enjoining all suits against the owner. All of these functions are those of a court having a special jurisdiction but exercising powers peculiar to a court of equity. A court of admiralty as such never exercised any such powers and never performed any such functions. This court has repeatedly said that a court of admiralty has not the characteristic powers of a court of equity. Upon this subject Mr. Justice Fuller says:

"While the court of admiralty exercises its jurisdiction upon equitable principles, it has not the characteristic powers of a court of equity. It cannot entertain a bill or libel for specific performance, or to correct a mistake, *Andrews v. Essex. Ins. Co.*, 3 Mason, 6, 16; or declare or enforce a trust or an equitable title, *Ward v. Thompson*, 22 How. 330; *The Amelia*, 6 Ben. 475; *Kellum v. Emerson*, 2 Curtis, 79; or exercise jurisdiction in matters of account merely, *Grant v. Poillon*, 20 How. 162; *Minturn v. Maynard*, 17 How. 477; *The Ocean Belle*, 6 Ben. 253; or decree the sale of a ship for an unpaid mortgage, or declare her to be the property of the mortgagees and direct possession of her to be given to them. *Bogart v. The John Jay*, 17 How. 399."

The Eclipse, 135 U. S. 599, 608.

The nature of the proceeding is such that the circuit court of appeals for the ninth circuit in this very proceeding (Record, p. 578) stated that the proceeding is "a suit in equity in admiralty." It would seem that one might with equal exactness speak about a suit in equity at law, or an action at law in equity, or a case in admiralty in equity.

This court has truly said that where a vessel is not surrendered to a trustee the proceeding to limit liability "*is an equitable action.*"

In re Morrison, 147 U. S. 34.

Such an equitable action, existing solely by virtue of statute, although within the jurisdiction of the district court is in no sense of the term "an admiralty case"; and the history of the law limiting the liability of shipowners shows that the district court has jurisdiction of the proceeding not as a case of admiralty jurisdiction but as a case of maritime jurisdiction.

"Actions at law," "suits in equity," "cases of admiralty jurisdiction," and "cases of maritime jurisdiction" are words which have been repeatedly used in the statutes of the United States; and such words have a definite and precise meaning. The very grant of judicial power contained in the constitution is in the following words:

"The judicial power shall extend to all cases of admiralty and maritime jurisdiction."

Constitution, Sec. II, article 3.

The district courts are given jurisdiction of all causes of admiralty and maritime jurisdiction.

The judiciary act of 1789, 1 Stats. at Large, 176.

The rules of practice established by this court for the guidance of the courts of the United States in the exercise of the constitutional jurisdiction are "rules of practice for the courts of the United States in admiralty and maritime jurisdiction."

The words "admiralty" and "maritime" have not the same meaning and should not on familiar principles be so construed.

To each of the words of the constitution is to be given its own meaning. Mr. Benedict well says:

"Its grants of judicial power, as well as of political sovereignty, are brief, sententious and comprehensive. None of its words are to be disregarded, as without meaning, nor to be considered as used to round a period, or to give fullness and euphony to a sentence. Its phraseology was most carefully chosen, and all its words are significant,

and introduced for the purpose of conveying their appropriate shades of meaning."

Benedict's Admiralty, 3d Ed., Sec. 21.

If several words are used which may or may not bear the same meaning, each word is to be held to be used in different senses, as otherwise it would appear that there had been a simple redundancy of language to express the same idea, and this redundancy is not to be presumed.

In Arthur v. Morgan, 112 U. S. 500, it was held that where words susceptible of the same meaning are used in connection with each other in the same statute, it must be held that by the use of the words a separate and distinct meaning was intended to be attached to each. In that case the court had occasion to construe a statute containing in one place the clause "household effects" and in another the clause "personal and household effects." In disposing of this question the court stated the following principle: "Clause 2 above uses the words 'personal and household effects.' This serves to show that, by the use of the words 'household effects' alone, in clause 1, in the same section of the statute, something is intended different from 'personal effects,' and that those words embrace articles which the words 'personal effects' do not cover."

In Anderson v. Fitzgerald, 24 Eng. Law & Eq. 1, it was said by Lord St. Leonards, page 14: "Now, when I find that the contract uses two words, which may have the same meaning, but which are open to different senses, to express the same thing, I must be very well satisfied, before I apply the same construction to those two words, that such was the intention; for if a proper word is used which admits of a different sense, although it may admit of the same sense, I should come naturally to the conclusion, if there is nothing in the context to prevent it, that the intention was not to use the second word in the same sense in which

the first word was used, or else why not repeat the first word?"

The words "admiralty" and "maritime" were used in the constitution in different senses; and by the use of the word "maritime" the judicial power of the United States and of the courts established by it is extended far beyond "the most ambitious pretensions of the English admiralty at any period of its existence." In two opinions delivered by justices of this court the words "admiralty" and "maritime" have been examined in connection with the jurisdiction of the district courts. One of these is the dissenting opinion of Mr. Justice Daniel in the case of the New Jersey Steam Navigation Co. v. Merchants' Bank of Boston, 6 How. 378, 405, and the other is the opinion of Mr. Justice Story, in De Lovio v. Boit, 2 Gallison, 398, 471. The first of these opinions was delivered in an attempt to exclude from the jurisdiction of the district courts contracts made on land but to be executed upon the water. The second opinion extended the jurisdiction of the district courts over all maritime cases. The first of these opinions is important and interesting only for the purpose of showing the controversy in this court over the jurisdiction of the district court; but the second is stated by Mr. Abbott in a note to the case in Meyer's Federal Decisions, Vol. 23, p. 20, as having at the time when he wrote been cited more frequently than even the famous Dartmouth College case. In the first opinion, referring to the opinion of Mr. Justice Story in De Lovio v. Boit, Mr. Justice Daniel uses the following language (6 How. 405):

"The still greater danger of theorizing upon words not of precise or definite import, freed from the restraints of settled acceptation, has been exemplified in our own time and country, in an able, learned and ingenious effort to confer on the admiralty here powers not merely coextensive with the most ambitious pretensions of the English

admiralty at any period of its existence, but powers that may be derived from the laws and institutions of almost every community of ancient or modern Europe, and covering not only seas and navigable waters, but men and their transactions having no necessary connection with waters of any description, namely, shipwrights, material men and insurers (vide 2 Gall. 397); and this upon the assumption that the term maritime implied more than the word admiralty, when unassociated with it, and that this was so understood by the framers of the constitution, who designed it as an enlargement of the admiralty power. Yet if we turn to the language of Mr. Justice Blackstone, Vol. 3, p. 106, he tells us that the courts maritime are the admiralty courts, using the terms maritime and admiralty as convertible; and that the injuries triable in the admiralty (or maritime causes) are such as are of common-law cognizance, yet, being committed on the high seas, are therefore to be tried by a peculiar court. Again, p. 68, he says: 'The maritime courts, or such as have power and jurisdiction to determine all maritime injuries arising upon the seas, or in parts out of the reach of the common law, are only the court of admiralty and its court of appeal.' So, likewise, Sir Matthew Hale, p. 50, in characterizing maritime contracts to be those made and to be executed upon the sea, certainly excludes any implication beyond these; and this must be taken as the English interpretation of the term maritime, by which it is understood as identical with admiralty."

In the second case, 2 Gall. 471, Mr. Justice Story says: "The clause, however, of the constitution not only confers ***admiralty*** jurisdiction, but the word 'maritime' is superadded, seemingly ***ex industria***, to remove every latent doubt. 'Cases of maritime jurisdiction' must include all maritime contracts, torts and injuries, which are in the understanding of the common law, as well as of the admi-

ralty, '*causae civiles et maritimae*.' In this view there is a peculiar propriety in the incorporation of the term 'maritime' into the constitution. The disputes and discussions, respecting what the admiralty jurisdiction was, could not but be well known to the framers of that instrument. One party sought to limit it by locality; another by the subject matter. It was wise, therefore, to dissipate all question by giving cognizance of all 'cases of maritime jurisdiction,' or, what is precisely equivalent, of all maritime cases. Upon any other construction, the word 'maritime' would be mere tautology; but in this sense it has a peculiar and appropriate force. Justice Winchester (speaking with reference to contracts) has very correctly observed that 'neither the judicial act nor the constitution, which it follows, limit the admiralty jurisdiction of the district court in any respect to place. It is bounded only by the *nature of the cause* over which it is to decide.'

"The language of the constitution will therefore warrant the most liberal interpretation; and it may not be unfit to hold that it had reference to that maritime jurisdiction, which commercial convenience, public policy and national rights have contributed to establish, with slight local differences, over all Europe; that jurisdiction which, under the name of consular courts, first established itself upon the shores of the Mediterranean, and, from the general equity and simplicity of its proceedings, soon commended itself to all the maritime states; that jurisdiction, in short which, collecting the wisdom of the civil law, and combining it with the customs and usages of the sea, produced the venerable *Consolato del Mare*, and still continues in its decisions to regulate the commerce, the intercourse, and the warfare of mankind."

Note in connection with this quotation that Mr. Justice Story applies the rule of construction to which reference has been made, namely, that both "admiralty" and "mari-

time" should be given a meaning, but not the same meaning; and note further, the definition attached by Mr. Justice Story to the words "maritime jurisdiction." This definition is important and directly applicable to the act to limit the liability of shipowners, as will be shown in connection with the discussion of the history of that act. It is needless to refer to decisions of this court for the purpose of showing that the able and learned and ingenious effort referred to by Mr. Justice Daniel to confer "on the admiralty here powers not merely coextensive with the most ambitious pretensions of the English admiralty at any period of its existence, but powers that may be derived from the laws and institutions of almost every community of ancient and modern Europe, and covering not only seas and navigable waters, but men and their transactions having no necessary connection with waters of any description; namely, shipwrights, material men and insurers," has succeeded; and a critical examination of the decisions shows that such result could only have been reached "upon the assumption that the term maritime implied more than the word admiralty, when unassociated with it, and that this was so understood by the framers of the constitution, who designed it as an enlargement of the admiralty power."

The words "cases of admiralty jurisdiction" had a meaning at the time of the adoption of the constitution, and they have that meaning yet, and can have no other meaning.

The admiralty and maritime jurisdiction of the United States is to be determined as of the date of the constitution. Upon this subject, Mr. Justice Catron says:

"The question presented involves a contest between the state and federal governments. The latter has no power or jurisdiction beyond what the constitution confers; and among these it is declared that the judicial power shall extend 'to all cases of admiralty and maritime juris-

diction'; and by the judiciary act of 1789, this jurisdiction is conferred on the district courts of the United States. The extent of power withdrawn from the states and vested in the general government, depends on a proper construction of the constitutional provision above cited. Its terms are indefinite, and its true limits can only be ascertained by reference to what cases were cognizable in the maritime courts when the constitution was formed—for what was meant by it then, it must mean now; what was reserved to the states to be regulated by their own institutions cannot be rightfully infringed by the general government, either through its legislative or judiciary department. The contest here is not so much between rival tribunals as between distinct sovereignties, claiming to exercise power over contracts, property and personal franchises."

Ferry Company v. Beers, 20 Howard, 401.

As a result of the foregoing principle, the judicial power of the United States cannot be enlarged by any act of congress or by any rule of this court. Upon this subject, Mr. Justice Bradley, in The Lottawanna, 21 Wall. 558, 575, says:

"The question is discussed with great felicity and judgment by Chief Justice Taney, delivering the opinion of the court in the case of ***The St. Lawrence***, where he says: 'Judicial power, in all cases of admiralty and maritime jurisdiction, is delegated by the constitution to the federal government in general terms, and courts of this character had then been established in all commercial and maritime nations, differing, however, materially in different countries in the powers and duties confided to them; the extent of the jurisdiction conferred depending very much upon the character of the government in which they were created, and this circumstance, with the general terms of the grant, rendered it difficult to define the exact limits of its power in the United States. This difficulty was in-

creased by the complex character of our government, where separate and distinct specified powers of sovereignty are exercised by the United States and a state independently of each other within the same territorial limits. And the reports of the decisions of the court will show that the subject has often been before it, and carefully considered, without being able to fix with precision its definite boundaries; but certainly no state law can enlarge it, nor can an act of congress or rule of court make it broader than the judicial power may determine to be its true limits. And this boundary is to be ascertained by a reasonable and just construction of the words used in the constitution, taken in connection with the whole instrument, and the purposes for which admiralty and maritime jurisdiction was granted to the federal government."

It follows from these decisions that if a proceeding to limit liability was not within the judicial power of the United States at the time of the adoption of the constitution, such judicial power could not be extended to any such proceeding by any subsequent act of congress or by any rule of this court. An examination of the earlier decisions of this court indicates clearly and positively that the words "admiralty jurisdiction" in the constitution would never have extended the judicial power of the United States to a proceeding to limit liability.

For years a controversy waged in this court as to whether the grant of judicial power in "cases of admiralty and maritime jurisdiction" was limited to those cases over which the admiralty courts of England exercised jurisdiction when the constitution was adopted, or whether it extended to the cases over which the admiralty court of England originally had jurisdiction and over which the admiralty courts of the states exercised jurisdiction at the time the constitution was adopted. In view of this controversy, can it truly be said that the words "cases of

admiralty jurisdiction" when used alone would have extended the judicial power of the courts of the United States to cases, subjects and reliefs unknown to the admiralty court of England in the exercise of their broadest jurisdiction and unknown to any of the state courts at the time of the adoption of the constitution?

Mr. Justice Clifford in 1887 sums up all of the cases decided during the controversy as to the limits of the constitutional jurisdiction in the following words:

"In order, therefore, to determine the limits of the admiralty jurisdiction, it becomes necessary to ascertain the true interpretation of the constitutional grant. On that subject three propositions may be assumed as settled by authority, and to those it will be sufficient to refer on the present occasion, without much discussion of the principles on which the adjudications rest:

1. That the jurisdiction of the district courts is not limited to the particular subjects over which the admiralty courts of the parent country exercised jurisdiction when our constitution was adopted.

2. That the jurisdiction of those courts does not extend to all cases which would fall within such jurisdiction, according to the civil law, and the practice and usages of continental Europe.

3. That the nature and extent of the admiralty jurisdiction conferred by the constitution must be determined by the laws of congress and the decisions of this court, and by the usages prevailing in the courts of the states at the time the federal constitution was adopted. No other rules are known which it is reasonable to suppose could have been in the minds of the framers of the constitution than those which were then in force in the respective states, and which they were accustomed to see in daily and familiar practice in the state courts.

Ex Parte Easton, 95 U. S. 70.

This careful statement of the extent of the admiralty jurisdiction would exclude from such jurisdiction proceedings to limit liability. The history of the limitation of the liability of shipowners shows that the rule was not the rule of the civil law or of the law of Oleron, or of any of the ancient codes at any time followed by the courts of admiralty in England, and was not in force in any of the states at the time of the adoption of the constitution. If the rule limiting liability was unknown to English courts of admiralty in the exercise of their widest jurisdiction and was unknown in the state courts at the time of the constitution, then the framers of the constitution were never accustomed to see any such rule or any such proceeding in daily and familiar practice in their state courts. If the rule was unknown, certainly the equitable proceeding, purely the creature of statute, was unknown to and beyond the jurisdiction of the admiralty courts, referred to by the framers of the constitution. The words "cases of admiralty jurisdiction" found in the constitution did not and can not include a proceeding created by statute in 1851 and affording equitable relief never before known to an admiralty court. It takes a broader word than "admiralty" to bring this proceeding within the jurisdiction of the district court; and such broader word is found in "maritime," as defined by Mr. Justice Story, in De Lovio v. Boit, 2 Gall. 471.

In the first case decided in this court in connection with the act limiting the liability of shipowners, Mr. Justice Bradley gives a history of the rule, and in a subsequent case again states its history.

Norwich Co. v. Wright, 13 Wall. 104, 116.

The Scotland, 105 U. S. 24, 28.

The facts stated in these cases show that while the limited liability of shipowners was a rule of the modern maritime law of Europe, it was not adopted by the civil law or by any of the ancient maritime codes constituting the

foundation of the English admiralty law, and that the rule owes its existence in this country and England solely by virtue of statute. Upon these subjects Mr. Justice Bradley says:

"But whilst this is the rule of the general maritime law of Europe, it was not received as law in England nor in this country until made so by statute."

The Scotland, 105 U. S. 28.

"But whilst the rule adopted by congress is the same as the rule of the general maritime law, its efficacy as a rule depends upon the statute and not upon any inherent force of the maritime law. . . . Therefore, whilst it is now a part of our maritime law, it is, nevertheless, statute law and must be interpreted and administered as such."

The Scotland, 105 U. S. 29.

"The history of the limitation of liability of shipowners is a matter of common knowledge. . The learned opinion of Judge Ware in the case of The Rebecca, leaves little to be desired on the subject. He shows that it originated in the maritime law of modern Europe; that whilst the civil, as well as the common, law made the owner responsible to the whole extent of damage caused by the wrongful act or negligence of the master or crew, the maritime law only made them liable (if personally free from blame) to the amount of their interest in the ship. So that, if they surrendered the ship they were discharged."

Norwich Company v. Wright, 13 Wall. 116.

The opinion of Judge Ware in The Rebecca, 1 Ware, 187, 194, shows, as stated by Mr. Justice Bradley, that the limitation of liability originated in a maritime law of modern Europe, was contrary to the Roman law, and was unknown to the laws of Oleron and every other system of jurisprudence applied by the English admiralty courts; but was a rule applied by the consular courts along the Mediterranean and first stated in the Consulate of the

Sea. Note some quotations from the opinion of Judge Ware:

"The principle of the limitation of the responsibility of the owners for the acts of the master, together with the cognate rule by which the ship is tacitly hypothecated for the obligations contracted by him, when acting in the quality of master, and within the scope of his authority as such, is entirely due to modern invention. No trace of it is to be found in the Digest of the Roman law, nor in the maritime legislation of the Eastern Empire, nor in the compilation which goes under the name of the Rhodian Law, a work which, though not entitled to the name which it has received, is undoubtedly a work of high antiquity, and of an earlier date than any of the maritime codes of Western Europe. It originated in the maritime usages of the middle ages, and more particularly in the Mediterranean, where commerce first acquired activity and extension after the fall of the Western Empire. In Italy and the southern ports of France and Spain the custom seems to have been nearly coeval with the revival of maritime commerce. That it had its origin in the Mediterranean, and probably in Italy, the cradle of the modern law merchant, appears from the fact that no traces of it are to be found in the ***Laws of Oleron***, a code earlier than the Consulate, at least in the form in which we now have it, and which constitutes the basis of the maritime law of the western parts of Europe; nor is there any indication of it in any of the earlier codes which were derived from this primitive compilation. It was at a later period that it extended to the western and northern ports of the continent." (Page 200.)

"That this was the settled law of the Mediterranean is abundantly proved by several chapters in the Consulate of the Sea, which governed the maritime commerce of all the ports of that sea" (Page 195.)

Speaking of the contract of ***Commande*** to which the origin of the custom is attempted to be traced, and to which Judge Ware states (p. 202) the Consulate devotes eleven chapters, Judge Ware states (p. 202):

"This contract being found to be so well adapted to the wants of society and to the hazards of commerce at the time, was not long in extending itself over the Continent of Europe. It seems, however, never to have reached England, or at least never was adopted there as a general commercial custom. The British Islands have always been, to a considerable extent, isolated from the rest of Europe in their customs and modes of thinking, as well as in their geographical position."

A reading of the entire opinion of Judge Ware in The Rebecca, ***supra***, shows that the rule limiting the liability of shipowners was not a rule of any court but was a general rule of maritime law applicable to all courts exercising jurisdiction in the states which had adopted it. As stated on pages 196, 197, "it became at once the universal law of maritime nations." The rule, therefore, is a rule of maritime law and never was a rule of the courts of admiralty, known to the framers of the constitution. A proceeding to limit liability is therefore cognizable in a district court, not because the proceeding is an admiralty case, but because it is a maritime case. In this connection note the quotation already made from the opinion of Mr. Justice Story in De Lovio v. Boit, 2 Gall. 471, defining "cases of maritime jurisdiction."

In connection with this definition the following quotation from the opinion of Mr. Justice Bradley in Butler v Boston Steamship Co., 130 U. S. 555, is interesting and instructive: (The italics are ours.)

"The law of limited liability, as we have frequently had occasion to assert, was enacted by congress as a part of the ***maritime*** law of this country, and therefore it is coex-

tensive, in its operation, with the whole territorial domain of that law. *Norwich Co. v. Wright*, 13 Wall. 104, 127; *The Lottawana*, 21 Wall. 558, 577; *The Scotland*, 105 U. S., 24, 29, 31; *Providence & New York Steamship Co. v. Hill Manfg. Co.*, 109 U. S. 578, 593. In *The Lottawana* we said: 'It cannot be supposed that the framers of the constitution contemplated that the law should forever remain unalterable. Congress undoubtedly has authority under the commercial power, if no other, to introduce such changes as are likely to be needed.' (P. 577.) Again, on page 575, speaking of the *maritime* jurisdiction referred to in the constitution, and the system of law to be administered thereby, it was said: 'The constitution must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of *maritime* law under the disposal and regulation of the several states, as that would have defeated the uniformity and consistency at which the constitution aimed on all subjects of a commercial character affecting the intercourse of the states with each other or with foreign states.' In *The Scotland* this language was used: 'But it is enough to say that the rule of limited responsibility is now our *maritime* rule. It is the rule by which, through the act of congress, we have announced that we propose to administer justice in *maritime cases*.' (P. 31.) Again, in the same case, p. 29, we said: 'But, whilst the rule adopted by congress is the same as the rule of the general *maritime law*, its efficacy as a rule depends upon the statute, and not upon any inherent force of the *maritime* law. As explained in *The Lottawana*, . . . the *maritime* law is only so far operative as law in any country as it is adopted by the laws and usages of that country; and this particular rule of the *maritime* law had never been adopted in this country until it was enacted by statute. Therefore,

whilst it is now a part of our *maritime* law, it is, nevertheless, *statute law*.' And in *Providence & New York Steamship Co. v. Hill Mntg. Co.*, it was said: 'The rule of limited liability prescribed by the act of 1851 is nothing more than the old *maritime* rule, administered in courts of admiralty in all countries except England, from time immemorial; *and if this were not so, the subject matter itself is one that belongs to the department of maritime law*.' (P. 593.)"

If the rule to limit liability is a rule of the maritime law to be administered in maritime cases, and exists wholly in this country as the result of statute, and was not a rule applied by any of the admiralty courts known to the framers of the constitution, then the statutory proceeding to limit in which the district court exercises the powers of a court of equity, as distinguished from those of a court of admiralty, cannot be termed an "admiralty case," but is a "maritime case" over which the district court, as a court of general maritime jurisdiction and powers, has cognizance.

Note some further facts showing the nature of the proceeding:

After the rule was adopted by statute in England, full limitation was obtained by bill in equity.

Norwich Co. v. Wright, 13 Wall. 118.

Massachusetts in 1818, and Maine in 1821, adopted the rule; but, under their practice, general limitation was obtained by a bill in equity.

Norwich Co. v. Wright, 13 Wall. 119.

Congress might have invested the circuit courts of the United States with jurisdiction of such cases by bill in equity. Congress not having so acted, this court held that the district courts as courts of admiralty and maritime jurisdiction, had jurisdiction over the matter. The rules of the district courts as courts of admiralty had no

application to such a proceeding, and therefore this court felt called upon in the exercise of an undoubted power to make the needful rules and regulations for facilitating the course of proceeding. This statement is clearly made by Mr. Justice Bradley, in Norwich Co. v. Wright, 13 Wall 123:

"Congress might have invested the circuit courts of the United States with the jurisdiction of such cases by bill in equity, but it did not. It is also evident that the state courts have not the requisite jurisdiction. Unless, therefore, the district courts themselves can administer the law, we are reduced to the dilemma of inferring that the legislature has passed a law which is incapable of execution. This is never to be done if it can be avoided. We have no doubt that the district courts, as courts of admiralty and maritime jurisdiction, have jurisdiction of the matter, and this court undoubtedly has the power to make all needful rules and regulations for facilitating the course of proceeding."

The district court, sitting as a court of admiralty, does not recognize or apply the rule in an admiralty case save and except when it is set up as a matter of defense. Even in a suit in rem, to which every creditor of the ship is a party, the district court, as a court of admiralty, does not and cannot grant the owner general limitation of liability; but such owner, in order to obtain the limitation, must commence the special proceeding prescribed by the rules of this court.

Norwich Co. v. Wright, 13 Wall. 104, 128.

When this proceeding is commenced, the jurisdiction which is exercised is not the jurisdiction of a court of admiralty, but of a court of equity, and the case is not an admiralty case, but an equitable action.

In re Morrison, 147 U. S. 34.

The constitution extends the grant of judicial power to "all causes of maritime and admiralty jurisdiction," and by the judiciary act the district courts are given jurisdiction of all "causes of admiralty and maritime jurisdiction." These words had their meaning and were used advisedly; and if congress had intended to cut off appeals to this court from the circuit courts of appeals in all cases of admiralty and maritime jurisdiction, it would have been easy to have used the familiar words found in the constitution and in the judiciary act. Not having used these words and limiting appeals only in "admiralty cases" and conferring the right of appeal in all other cases, it should have presumed that this proceeding of a purely equitable character not cognizable by the district court as a court merely of admiralty was one of the class of cases in which an appeal exists as a matter of right to this court. The appeal taken in this case was taken after due consideration. We feel that jurisdiction over it should be exercised by this court; and we hope that this argument, necessarily hastily prepared, will at least satisfy the court that we need not feel ashamed because this appeal was taken, notwithstanding that no right of appeal to this court exists in "an admiralty case."

W. W. COTTON,
For Appellants.

A. B. BROWNE,
Of Counsel.

No. 73 and 74.

Off. of Williams & Wood for Appellees

Office Supreme Court U.S.
FILED
SEP 11 1900
JAMES H. MCKENNEY,
Clerk.

IN THE

# SUPREME COURT

Filed Sept. 11, 1900.

OF THE

## UNITED STATES

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THE OREGON RAILROAD AND NAVIGATION COMPANY, *Appellant*,

*v.*

ROBERT BALFOUR, *et al.*, partners doing business as BALFOUR, GUTHRIE & Co., *et al.*, *Appellees*.

73

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THE OREGON RAILWAY AND NAVIGATION COMPANY and THE OREGON SHORT LINE & UTAH NORTHERN RAILWAY COMPANY, *Appellants*,

*v.*

ROBERT BALFOUR, *et al.*, partners doing business as BALFOUR, GUTHRIE & Co., *et al.*, *Appellees*.

74

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## Motion to Dismiss Appeal and Affirm, and Brief on Same.

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GEO. H. WILLIAMS and
C. E. S. WOOD,
*Proctors for Balfour, Guthrie & Co.*

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PORTLAND, OREGON:
F. W. BALTES AND COMPANY, PRINTERS, 225 OAK STREET.
1900.

IN THE

# SUPREME COURT

OF THE

UNITED STATES

THE OREGON RAILROAD AND NAVIGATION COMPANY, *Appellant*,

*v.*

ROBERT BALFOUR, *et al.*, partners doing business as BALFOUR, GUTHRIE & Co., *et al.*, *Appellees.*

THE OREGON RAILWAY AND NAVIGATION COMPANY and THE OREGON SHORT LINE & UTAH NORTHERN RAILWAY COMPANY, *Appellants*,

*v.*

ROBERT BALFOUR, *et al.*, partners doing business as BALFOUR, GUTHRIE & Co., *et al.*, *Appellees.*

## Motion to Dismiss and Affirm.

Now come Robert Balfour, Stephen Williamson, Alexander Guthrie, Robert Brodie Forman, R. Bruce and Walter J. Burns, partners under the firm name of Balfour, Guthrie & Co., appellees herein, by George H. Williams and C. E. S. Wood, their proctors, and move in each of the above entitled several cases that the appeal be dismissed; and said appellees move in each of said cases that the judgment rendered in each of said cases by the United States Circuit Court of Appeals for the ninth circuit, October term, 1898, be affirmed.

GEORGE H. WILLIAMS and
C. E. S. WOOD,
*Proctors for Balfour, Guthrie & Co.*

# Brief on Motion to Dismiss and Affirm.

The suit in which this appeal is taken was one originally brought in the district court of the United States for the district of Oregon by appellants Oregon Railway & Navigation Company and Oregon Short Line & Utah Northern Railway Company, praying for limitation of their liability for losses arising by reason of the wreck of the barge "Columbia," upon waters within the jurisdiction of said district court, and the appeal itself is taken from the decree of the United States Circuit Court of Appeals for the ninth circuit, affirming the final decree of said district court.

I.

This court has no jurisdiction to entertain the appeal.

Section 6 of the act establishing the United States Circuit Courts of Appeal provides that the decree of such court shall be final in admiralty cases.

Aztec Mining Co. v. Ripley, 151 U. S. 79.

Proceedings under the act of congress limiting the liability of shipowners are cases in admiralty.

Norwich Co. v. Wright, 13 Wall. 104, 123.

The "Benefactor," 103 U. S. 239, 246.

Providence & New York Steamship Co v. Hill Mnfg. Co., 109 U. S. 578.

Butler v. Boston Steamship Co., 130 U. S. 527.

Supreme Court Rules of Practice in Admiralty 54, 55, 56 and 57.

In Norwich v. Wright, 13 Wall. 123, 124, this court says:

"Now, no court is better adapted than a court of admiralty to administer precisely such relief. It happens every day that the proceeds of a vessel, or other fund, is

brought into that court to be distributed amongst those whom it may concern. Claimants are called in by monition to present and substantiate their respective claims; and the fund is divided and distributed according to the respective liens and rights of all the parties. Congress might have invested the circuit courts of the United States with the jurisdiction of such cases by bill in equity, but it did not. It is also evident that the state courts have not the requisite jurisdiction. Unless, therefore, the district courts themselves can administer the law, we are reduced to the dilemma of inferring that the legislature has passed a law which is incapable of execution. This is never to be done if it can be avoided. We have no doubt that the district courts, as courts of admiralty and maritime jurisdiction, have jurisdiction of the matter; and this court undoubtedly has the power to make all needful rules and regulations for facilitating the course of proceeding."

Following upon which decision, rules 53, 54, 55, 56, 57 and 58 of this court were adopted as rules of practice in admiralty..

And, as this court again says, in Butler v. Boston & S. S. S. Co., 130 United States, 557:

"The present case, therefore, is clearly within the admiralty and maritime jurisdiction. . . . It is unnecessary to consider the force and effect of the statute of Massachusetts over the place in question. Whatever force it may have in creating liabilities for acts done there, it cannot neutralize or affect the admiralty or maritime jurisdiction or the operation of the maritime law in maritime cases."

And in Providence & N. Y. Steamship Co. v. Hill Manuf'g Co., 109 United States, 593:

"The subject is one pre-eminently of admiralty jurisdiction. The rule of limited liability prescribed by the

act of 1851 is nothing more than the old maritime rule administered in courts of admiralty in all countries except England from time immemorial; and, if this were not so, the subject-matter itself is one that belongs to the department of maritime law. The adoption of forms and modes of proceeding requisite and proper for giving due effect to the maritime rule thus adopted by congress, and for securing to shipowners its benefits, was therefore strictly within the powers conferred upon this court; and where the general regulations adopted by this court do not cover the entire ground, it is undoubtedly within the power of the district and circuit courts, as courts of admiralty, to supplement them by additional rules of their own."

And again, in the same case, page 594:

"In promulgating the rules referred to, this court expressed its deliberate judgment as to the proper mode of proceeding on the part of shipowners for the purpose of having their rights under the act declared and settled by the definitive decree of a competent court, which should be binding on all parties interested, and protect the shipowners from being harassed by litigation in other tribunals."

And again, in the same case, page 599:

"We see no reason to modify these views (Norwich Transp. Co. v. Wright, supra), and, in our judgment, the proper district court, designated by the rules or otherwise indicated by circumstances, has full jurisdiction and plenary power, as a court of admiralty, to entertain and carry on all proper proceedings for the due execution of the law, in all its parts."

Respectfully submitted.

GEORGE H. WILLIAMS,

C. E. S. WOOD,

Proctors for Appellees.

# Supreme Court of the United States.

Nos. 73 and 74.—October Term, 1900.

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| The Oregon Railway and Navigation Company, Appellant,<br>73<br>*vs.*<br>Robert Balfour et al., partners, doing business as Balfour, Guthrie & Co., et al. | Appeals from the United States Circuit Court of Appeals for the Ninth Circuit. |
| The Oregon Railway and Navigation Company and the Oregon Short Line and Utah Northern Railway Company, Appellants,<br>74<br>*vs.*<br>Robert Balfour et al., partners, doing business as Balfour, Guthrie & Co., et al. | |

[October 22, 1900.]

Mr. Chief Justice Fuller delivered the opinion of the Court:

These were petitions for a limitation of liability of ship-owners, filed in the District Court of the United States for the District of Oregon, sitting in admiralty, which proceeded to decree in that court. From this decree appeals were prosecuted to the United States Circuit Court of Appeals for the Ninth Circuit and the decree affirmed. 90 Fed. Rep. 295. From that decree appeals were taken to this court, which appellees now move to dismiss.

By the sixth section of the judiciary act of March 3, 1891, it is provided that the judgments or decrees of the Circuit Courts of Appeals in admiralty cases shall be final; and no appeal to this court lies therefrom. If then proceedings under the act of Congress to limit the liability of ship owners, and the rules of this court in that regard, are admiralty cases, it follows that the motions to dismiss must be sustained.

By the second section of article three of the Constitution, the judicial power extends "to all cases of admiralty and maritime jurisdiction," the word "maritime" having been added, out of abundant caution, to preclude a narrow interpretation of the word "admiralty."

The jurisdiction to limit the liability of ship owners was conferred upon the district courts by the act of Congress of March 3, 1851, 9 Stat. 635, c. 43, carried forward into sections 4282 to 4289 of the Revised Statutes.

It was not until December term, 1871, in the case of the *Norwich Transportation Company* v. *Wright*, 13 Wall. 104, that the court was called upon to interpret the act, and to adopt some general rules for the purpose of carrying it into effect, and this was done at that term. 13 Wall. xii, xiii; Rules of Practice in Admiralty, 54–58.

The power of Congress to pass the act of 1851 and the power of this court to prescribe rules regulating proceedings thereunder were maintained in that case, and were recognized and reaffirmed in many subsequent cases. *The Benefactor*, 103 U. S. 239; *The Scotland*, 105 U. S. 24; *Providence &c. S. S. Co.* v. *Manufacturing Co.* 109 U. S. 578; *Butler* v. *Boston S. S. Co.* 130 U. S. 527; *In re Morrison, Petitioner*, 147 U. S. 14, 34. In the latter case the proceeding is styled "an equitable action," but not in any sense as inconsistent with the admiralty jurisdiction.

In these cases the provisions of the act and of the rules are fully set forth, explained, and commented on, and need not be repeated. As decisive of the question before us it will be sufficient to give the following extracts from the opinion of the court, delivered by Mr. Justice Bradley, in *Providence Steamship Co.* v. *Manufacturing Company:*

"The subject is one pre-eminently of admiralty jurisdiction. The rule of limited liability prescribed by the act of 1851 is nothing more than the old maritime rule administered in courts of admiralty in all countries except England, from time immemorial; and if this were not so, the subject matter itself is one that belongs to the department of maritime law. The adoption of forms and modes of proceeding requisite and proper for giving due effect to the maritime rule thus adopted by Congress, and for securing to ship owners its benefits, was therefore strictly within the powers conferred upon this court; and where the general regulations adopted by this court do not cover the entire ground, it is undoubtedly within the power of the district and circuit courts, as courts of admiralty, to supplement them by additional rules of their own. . . . In promulgating the rules referred to, this court expressed its deliberate judgment as to the proper mode of proceeding on the part of ship owners for the purpose of having their rights under the act declared and settled by the definitive decree of a competent court, which should be binding on all parties interested, and protect the ship owners from being harassed by litigation in other tribunals. . . . We see no reason to modify these views, and, in our judgment, the proper district court, designated by the rules, or otherwise indicated by circumstances, has full jurisdiction and plenary power, as a court of admiralty, to entertain and carry on all proper proceedings for the due execution of the law, in all its parts."

Clearly then these were admiralty cases; the decrees of the Circuit Court of Appeals were made final by the statute; and the appeals must be

*Dismissed.*

True copy.

Test:

*Clerk Supreme Court, U. S.*